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No. 1499

UNITED STATES CIRCUIT COURT of APPEALS

FOR THE NINTH CIRCUIT.

COE D. BARNARD,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit Court for the District of Oregon.

FILMER BROS. CO. PRINT, 1642 HOWARD ST., S. F. CAL.

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In the United States Circuit Court, for the District of Oregon.

COE D. BARNARD,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Order Extending Time to File Record (Original).

United States of America,
District of Oregon,—ss.

Whereas, the above-named defendant, Coe D. Barnard, has filed a petition for a writ of error in the above-entitled cause from the United States Circuit Court of Appeals for the Ninth Circuit, to the above-entitled court; and,

Whereas, said writ has been allowed and the assignment of errors filed and citation issued and served, and a writ of error issued in said cause; and,

Whereas, the proposed bill of exceptions in said cause has been duly filed and served, but owing to the absence of the judge who tried the case from the district, the same has not been settled; and,

Whereas, it is manifestly impossible to perfect and prepare the transcript within the time allowed for the return of said writ,—

Now, therefore, the time for returning said writ and docketing said cause in the said Circuit Court of Appeals and preparing and transmitting the record in said cause to the above-named Circuit Court of Appeals, is hereby extended until the 15th day of May, 1907.

Dated at Portland, Oregon, this 15th day of February, 1907.

CHAS. E. WOLVERTON,
District Judge Sitting as Circuit Judge.

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. Coe D. Barnard vs. United States of America. Order Extending Time to Docket Cause.

No. 1499. United States Circuit Court of Appeals for the Ninth Circuit. Order Extending Time to Docket Cause. Filed Feb. 25, 1907. F. D. Monckton, Clerk. Re-filed Sep. 6, 1907. F. D. Monckton, Clerk.

In the Circuit Court of the United States for the District of Oregon.

No. 2943—May 3, 1907.

UNITED STATES OF AMERICA,

vs.

COE D. BARNARD.

Order Extending Time to File Record (Original).

Now, at this day, comes the above-named plaintiff by Mr. William C. Bristol, United States Attorney, and the defendant herein by Mr. A. S. Bennett, of counsel, and, thereupon, upon agreement of the parties hereto, it is hereby ordered that the time heretofore allowed said defendant in which to file his transcript of record in this cause, in the United States Circuit Court of Appeals for the Ninth Circuit, be, and it is hereby, extended to the 1st day of September, 1907.

WILLIAM H. HUNT,
Judge.

[Endorsed]: No. 1499. United States Circuit Court of Appeals for the Ninth Circuit. Order Extending Time to File Record. Filed May 14, 1907. F. D. Monckton, Clerk. Re-filed Sep. 6, 1907. F. D. Monckton, Clerk.

Citation on Writ of Error (Original).

United States of America,
District of Oregon,—ss.

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of

Appeals for the Ninth Circuit at San Francisco, California, within thirty days from the date hereof pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Oregon, wherein Coe D. Barnard is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland in said district this 15th day of February, 1907.

CHAS. E. WOLVERTON,
District Judge Sitting as Circuit Judge.

United States of America,
District of Oregon,—ss.

Due and legal service of the attached and foregoing citation is hereby accepted and admitted at Portland in said district, this 15th day of February, 1907.

WM. C. BRISTOL,
United States District Attorney for the United States.

[Endorsed]: No. 2941. United States Circuit Court for the District of Oregon. United States of America vs. Coe D. Barnard. Citation on Writ of Error. U. S. Circuit. Filed Feb. 15, 1907. J. A. Sladen, Clerk. District of Oregon.

In the United States Circuit Court of Appeals for the Ninth Circuit.

COE D. BARNARD,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Writ of Error (Original).

The United States of America,—ss.

The President of the United States of America, to the Judges of the Circuit Court of the United States for the District of Oregon, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the Circuit Court before the Honorable William H. Hunt, one of you, between the United States of America, plaintiff and defendant in error, and Coe D. Barnard, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send

the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this February 15, 1907.

[Seal] J. A. SLADEN,

Clerk of the Circuit Court of the United States for the District of Oregon.

District of Oregon,—ss.

I hereby certify that the foregoing writ of error was served upon the Circuit Court of the United States for the District of Oregon, by lodging a duly certified copy thereof with me as clerk of said court this 15th day of February, 1907.

J. A. SLADEN,

Clerk U. S. Circuit Court, District of Oregon.

[Endorsed]: In the U. S. Circuit Court of Appeals for the Ninth Circuit. Coe D. Barnard, Plaintiff in Error, vs. The United States of America, Defendant in Error. Writ of Error. Filed February 15, 1907. J. A. Sladen, Clerk United States Circuit Court, District of Oregon.

In the Circuit Court of the United States for the District of Oregon.

October Term, 1904.

Caption.

Be it remembered, that on the 8th day of April, 1905, there was duly filed in the Circuit Court of the United States for the District of Oregon, an indictment, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

Of the October Term in the Year of Our Lord Nineteen Hundred and Four.

UNITED STATES OF AMERICA

vs.

COE D. BARNARD.

Violation of Section 5392 of the Revised Statutes of the United States and Amendment of March 2, 1901.

Indictment.

District of Oregon,—ss.

The Grand Jurors for the United States of America, inquiring for the District of Oregon, upon their oath present that on the twenty-third day of June, in the year of our Lord nineteen hundred and four, Coe D. Barnard, late of the county of Wheeler, in the State and District of Oregon, at and within the said county of Wheeler, in the district aforesaid, came in person before James S. Stewart, who was then and there the duly appointed, qualified and acting United States Commissioner for the District of Oregon, and who was then and there an officer, who was authorized by the laws of the United States to administer an oath and to take the testimony of witnesses in the matter of the application of a claimant to make final proof upon a homestead entry of public lands of the United States lying within The Dalles land district of the United States in the said District of Oregon, and that the said James S. Stewart, as such United States Commissioner for the District of Oregon, was then and there engaged in taking and hearing testimony in the matter of the application of Charles A. Watson, late of said District of Oregon, to make final proof in support of his homestead entry for the south half of the northeast

quarter, the southeast quarter of the northwest quarter and northeast quarter of the southwest quarter of section 11, township 6 south, range 19 east, Willamette meridian, said lands so described being then and there public lands of the United States, upon which said Charles A. Watson had theretofore made a homestead filing at said land office of the United States at The Dalles, in said District of Oregon, under Section 2290, Revised Statutes of the United States, and said lands being then and there within said land district of the United States, and said District of Oregon, and that the said Coe D. Barnard then and there, to wit, on the day aforesaid, in the county and district aforesaid, subscribed his name to certain testimony, which had then and there been given by him before said James S. Stewart, as such United States Commissioner for the District of Oregon, in the matter aforesaid, and that said testimony, so then and there subscribed by him, was read to him before being so subscribed, and was then and there sworn to by him as true before said James S. Stewart, as such United States Commissioner for said District of Oregon, and that it then and there became, and was, material that the said James S. Stewart, as such United States Commissioner for the District of Oregon, and the register and receiver of said United States land office at The Dalles, in said District of Oregon, should know and be informed from

and by the said testimony whether the said Charles A. Watson had settled and resided upon and improved or cultivated the said lands so described, as required by the homestead laws of the United States, and if so, when such settlement and residence began, and how long it continued, and what was its character, and whether it commenced in the year 1898, and continued for five years thereafter, and especially whether the said Charles A. Watson had resided continuously on said land for a period of five years since first establishing residence thereon, and for what period or periods said Charles A. Watson had been absent from said land since making settlement thereon, and for what purpose he was so absent, and whether said Charles A. Watson had cultivated said land, and how much thereof he had so cultivated, and for how many seasons he raised crops thereon, and what improvements were on said land, and what was their value; and thereupon the said Coe D. Barnard then and there, to wit, at the time and place first aforesaid, was in due manner sworn by the said James S. Stewart, and made oath before him of and concerning the truth of the matters contained in said testimony so subscribed by him, and the said Coe D. Barnard, so being sworn as aforesaid, then and there, to prevent the said James S. Stewart, United States Commissioner for the District of Oregon, and the said Register and

Receiver of the United States Land Office at The Dalles, in said District of Oregon, from knowing the true facts and circumstances pertaining to the settlement and residence of the said Charles A. Watson upon, and his cultivation and improvement of the said lands, so described in and by his said testimony, so subscribed, willfully, corruptly and falsely, and contrary to his said oath, did depose and swear as in the said testimony set forth, of and concerning the material facts aforesaid, and did state and subscribe material matters which he did not then believe to be true; which said testimony, so given and subscribed by said Coe D. Barnard, was and is in the words and figures following, to wit:

HOMESTEAD PROOF—TESTIMONY OF WITNESS.

Coe D. Barnard, being called as witness in support of the Homestead entry of Charles A. Watson for S. ½ NE. ¼, SE. ¼, NW. ¼ and NE. ¼ SW. ¼, Sec. 11, Tp. 6 S. R. 19 E., W. M., testifies as follows:

Ques. 1.—What is your name, age and postoffice address?

Ans. Coe D. Barnard, age 31 years, Fossil, Ore.

Ques. 2.—Are you well acquainted with the claimant in this case and the land embraced in his claim?

Ans. Yes.

Ques. 3.—Is said tract within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business?

Ans. No.

Ques. 4.—State specifically the character of this land—whether it is timber, prairie, grazing, farming, coal, or mineral land.

Ans. Grazing land, rough and mountainous.

Ques. 5.—When did claimant settle upon the homestead, and at what date did he establish actual residence thereon?

Ans. In the spring of 1898, established residence at the same time.

Ques. 6.—Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried, state the fact.)

Ans. Yes, except as stated below. He is unmarried. I live about eight miles from settler's place. In riding for my stock, I frequently ride past his place and stop at his house.

Ques. 7.—For what period or periods has the settler been absent from the land since making settlement, and for what purpose; and if temporarily absent, did claimant's family reside upon and cultivate the land during such absence?

Ans. He made a trip to the Willamette Valley in July, 1902, for the benefit of his health and returned in October, 1902.

Ques. 8.—How much of the homestead has the settler cultivated, and for how many seasons did he raise crops thereon?

Ans. About two acres, he raised a garden on it every year since 1898. The rest of the land is too steep, rough and rocky for cultivation. He pastures about 25 head of his horses on the place.

Ques. 9.—What improvements are on the land, and what is their value?

Ans. Lumber house 12x16 lumber roof, lumber floor, one room, ceiled and papered, good spring water all fenced with three wires; total value of improvements about $250.00. One door and one window.

Ques.10. Are there any indications of coal, salines, or minerals of any kind on the homestead? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans. No.

Ques. 11.—Has the claimant mortgaged, sold, or contracted to sell, any portion of said homestead?

Ans. Not to my knowledge.

Ques. 12.—Are you interested in this claim; and do you think the settler has acted in entire good faith in perfecting this entry?

Ans. No. Yes.

[Sign plainly with full Christian name.]

COE D. BARNARD.

I hereby certify that the foregoing testimony was read to the witness before being subscribed and was sworn to before me this 23d day of June, 1904, at my office at Fossil, in Wheeler County, Oregon.

JAS. S. STEWART,
U. S. Com. for Oregon.

Whereas, in truth and in fact, the said Charles A. Watson, at the time when said Coe D. Barnard so subscribed and sworn to the truth of said testimony, as aforesaid, as he, the said Coe D. Barnard, then and there well knew, had never settled or resided upon or improved or cultivated the said land, so described, as required by the said homestead laws of the United States, or in any manner whatever, and had not settled upon and established actual residence thereon in the year 1898, or at any other time, and had not resided continuously on said land, so described, or any part thereof, since first establishing residence thereon, except when he made a trip to the Willamette Valley in July, 1902, for the benefit of his health, or otherwise or at all, and had not returned to said land and re-established his actual residence thereon in October, 1902, or at any other time in said year, or in any other year, and had not raised a crop on said land every year from 1898 to

1904, or during any of said years, and had not cultivated two acres of said land.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Coe D. Barnard, in manner and form aforesaid, in and by his said testimony, and upon his oath aforesaid, in a case in which a law of the said United States authorized an oath to be administered, unlawfully did willfully, and contrary to his said oath, state and subscribe material matters, which he did not then believe to be true, and thereby did commit willful and corrupt perjury against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

Dated at Portland, Oregon, the eight day of April, 1905.

FRANCIS J. HENEY,
United States Attorney, District of Oregon.

W. H. H. WADE,
Foreman of United States Grand Jury.

Witnesses sworn and examined before the U. S. Grand Jury:

E. A. PUTNAM.
D. M. WALTON.
WILLIAM SHEPHARD.

A True Bill. W. H. H. Wade, Foreman of the Grand Jury. Filed April 8, 1905. J. A. Sladen, Clerk U. S. Circuit Court, District of Oregon.

And afterwards, to wit, on Saturday, the 8th day of April, 1905, the same being the 161st judicial day of the regular October, 1904, term of said court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 2941—April 8, 1905.

UNITED STATES OF AMERICA,

vs.

COE D. BARNARD.

Order that Indictment be Filed and Fixing Bail of Defendant.

Indictment: Section 5392, R. S., U. S.

Now, at this day, comes the grand jury impaneled herein, and through its foreman, presents to the Court an indictment charging the above-named defendant, Coe D. Barnard, with violation of section 5392, of the Revised Statutes of the United States, endorsed "a true bill," which indictment is received by the Court and ordered to be filed. And, on motion of said plaintiff, it is ordered that the bail of said de-

fendant be, and it is hereby, fixed at $4,000.00, and that the Clerk of this Court approve said bond.

And afterwards, to wit, on Wednesday, the 12th day of April, 1905, the same being the 3d Judicial day of the regular April, 1905, term of the said Court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge, presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 2941—April 12, 1905.

THE UNITED STATES OF AMERICA,

vs.

COE D. BARNARD.

Arraignment, etc.

Indictment: Section 5392, R. S., U. S.

Now, at this day, comes the plaintiff herein by Mr. Francis J. Heney, United States Attorney, and the above-named defendant, Coe D. Barnard, in his own proper person and by Mr. A. S. Bennett, of counsel, and thereupon, said defendant is duly arraigned upon the indictment herein, and waives the reading of said indictment. And said defendant files herein, in open court, his plea in abatement of said indictment, whereupon, said plaintiff objects to said plea in abate-

ment, on the ground, first, that it comes too late, and second, that it contains matters which contradict the record or which are, if true, only provable by the testimony of the grand jury, or of the United States Attorney, who must be permitted to disclose that which the terms of their oaths or the general rules of law, requires them to keep secret, in order to contradict the same, and the effect of which is to impeach their verdict, and that such matters cannot be set up in a plea in abatement.

And afterwards, to wit, on the 12th day of April, 1905, there was duly filed in said court a plea in abatement, in words and figures, as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 2941.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

COE D. BARNARD.

Defendant.

Plea in Abatement.

Now comes the defendant Coe D. Barnard in his own proper person and by Alfred S. Bennett, his

attorney, and having heard read the indictment in the above-entitled cause, and answering for and by way of plea in abatement thereto, saith:

That he ought not to be compelled to answer the said indictment because, as this defendant alleges, the pretended grand jury returning the same into court, was not a regularly organized or impaneled grand jury at the time of bringing in and returning said indictment, or at any time, and that said grand jury was not regularly organized or impaneled, but that on the contrary said grand jury was irregular and void in this:

That on the 18th day of October, 1904, said grand jury was impaneled and organized consisting of twenty-one persons including among others, W. E. Robertson and Carl Phelps, and the said grand jurors were sworn, and said W. E. Robertson appointed foreman; that said Carl Phelps and W. E. Robertson were qualified and lawful jurors, to sit as grand jurors in said court, and had each and all of the qualifications required by law, and that said grand jury retired and commenced their investigation.

That thereafter and on the 19th day of October, 1904, said Robertson was excused for the term without cause, that nevertheless said grand jury continued to perform their duties and to investigate cases before them until the 25th day of October, 1904, when one

George Publer, who had never been a member thereof, was added to said grand jury by an order of this Honorable Court, and was impaneled and sworn as a grand juror and took his seat with said grand jurors, and from that time up to and including the finding of this indictment acted with said jurors, and took part as such pretended grand jury in the finding of the indictment in this case.

That thereafter the said pretended grand jury continued to transact business as such grand jury until about the 19th day of December, 1904, when one Fred. G. Buffum, who was not one of the grand jurors, originally impaneled and who had not acted with said grand jury up to that time, was by order of this court added to said pretended grand jury and impaneled and sworn as one of said grand jurors, and that he continued to act with said grand jurors as one of said grand jury up to the time that this indictment was returned into court, and took part in the investigation of this charge from that time up to the finding of this indictment and voted upon the finding thereof.

That thereafter and on the 27th day of January, 1905, and before this indictment was voted or returned into court, the aforesaid Carl Phelps was excused from such grand jury by order of this court, although he had been taking part in the investigation of this charge, and had heard the testimony therein, and that he never thereafter acted as such grand

juror all to the substantial prejudice of this defendant, all of which the said defendant is ready to prove and verify.

Wherefore, he prays judgment whether he shall be called further to answer the said indictment, and prays that the same may be quashed, and that he be dismissed from this court and go hence without day.

And for a still further answer and plea in abatement and for the reason why he ought not to be compelled to answer said indictment, the defendant believes and alleges:

That George Gustin was duly impaneled and sworn as a member of said grand jury at the time of its formation, and continued to sit with said grand jury up to the time that this indictment was returned, and participated in the taking of evidence against the defendant in this charge, and voted with the other grand jurors upon the finding of this indictment, and this defendant is informed and believes that said grand juror, George Gustin, was not a qualified juror at the time he was impaneled on said grand jury, or at the time of voting upon and returning said indictment, or ever at any time, for the reason that he was not at such times, and never had been, a citizen of the United States or of the District of Oregon, but that he was at said times and dates, and still is, a citizen of some foreign country, but what exact country is to this defendant unknown.

That this defendant was not present at the formation of said grand jury and had no opportunity to challenge said jurors, and had no knowledge of the disqualification of said juror Gustin until this day, all of which he is ready to prove and verify.

Wherefore, he prays judgment whether he shall be called further to answer the said indictment, and prays that the same may be quashed, and that he be dismissed from this court and go hence without day.

And for a still further answer and plea in abatement, defendant saith:

That he ought not to be compelled to answer the said indictment because defendant is informed and believes that Frank Bolter and Joseph Essner, who were sworn and impaneled as said grand jurors upon said panel, both of whom continued to act as said jurors up to the time of the return of this indictment and who participated in the taking of testimony therein, and in voting upon said indictment, were neither of them taxpayers in the county in which they resided, or in any county in the State of Oregon, nor was the name of either of them upon the preceding assessment-roll of said county or any county in said state at the time they were impaneled and sworn as such jurors, or at the time of the return of this indictment into court.

And this defendant further alleges and says: That by the laws of the State of Oregon, one of the qualifi-

cations for jurors in said state is that said juror's name be upon the preceding assessment-roll in the county in which he is called.

Wherefore, he prays whether he shall be called further to answer the said indictment, and prays that the same may be quashed, and that he may be dismissed from this court and go hence without day.

And for a still other and further answer and plea in abatement in, of and to said indictment, the defendant saith:

That he ought not to be compelled to answer the said indictment, because, as defendant is informed and believes, one Francis J. Heney, appeared and acted before said grand jury in the prosecution of said charge as a pretended United States District Attorney, and that said Francis J. Heney was not at all or any of said times a permanent or any resident of the District of Oregon, but a resident of the State of California, and that he could not lawfully act or appear as District Attorney, and never was and could not be by reason of said nonresidence, lawfully or legally appointed to said office, and never had any legal authority to act as such District Attorney; that he came to Oregon from said State of California temporarily only and for the purpose of prosecuting this cause and other causes of a similar nature, that he expects and has always expected to return to said State of California to reside permanently as soon as these

prosecutions are completed; that said Francis J. Heney greatly influenced said grand jury to find this indictment, and this defendant alleges that if said Francis J. Heney had not so unlawfully appeared before said grand jury this indictment would not have been brought all to defendant's substantial prejudice all of which defendant is ready to verify.

Wherefore, he prays judgment whether he shall be called further to answer the said indictment, and prays that the same may be quashed, and that he be dismissed from this court and go hence without day.

COE D. BARNARD.

ALFRED S. BENNETT,

Atty. for Deft.

United States of America,
District of Oregon,
County of Multnomah,—ss.

I, Coe D. Barnard, being first duly sworn, depose and say: That I have read the above and foregoing plea in abatement, and that the same is true as I verily believe.

COE D. BARNARD,

Sworn to and subscribed before me this 11th day of April, 1905.

[Seal] C. H. SHOLES,

Notary Public for Oregon.

Filed in open Court April 12, 1905. J. A. Sladen, Clerk.

And afterwards, to wit, on Tuesday, the 25th day of April, 1905, the same being the 14th judicial day of the regular April, 1905, term of said Court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 2941—April 25, 1905.

THE UNITED STATES OF AMERICA,

vs.

COE D. BARNARD.

Minutes Relative to Pleas in Abatement, Stipulation of Counsel Relative to Objections Thereto, etc.

Indictment: Section 5392, R. S., U. S.

Now, on this day, this cause coming on for decision upon the pleas in abatement heretofore filed by the above-named defendant, Coe D. Barnard, and said defendant being present in court by his counsel, Mr. Alfred S. Bennett, it is stipulated and agreed, in open Court, by and between the United States Attorney and said counsel for said defendant that the same objections which were filed in the case of the United States vs. John H. Mitchell, in case No. 2902, in this

court, may be deemed and treated as properly filed heretofore in this case in opposition to the plea in abatement heretofore filed by said defendant herein, and that the affidavit of Georgio Giustinianovich, and the certified copy of the decree of the County Court of the State of Oregon for Clatsop County, heretofore filed in said case No. 2902, in support of the aforesaid objections, be deemed and treated as offered in support of said objections to the pleas in abatement in this case, and that the same proceedings, rulings, objections, and exceptions that were made and had before this Court in said case No. 2902, in relation to the pleas in abatement, and the objections thereto, and to said affidavit and said certified copy of the decree of said County Court of the State of Oregon for Clatsop County, be deemed, considered and treated as having occurred upon the hearing of the pleas in abatement of said defendant, Coe D. Barnard, in this case, and that the orders, rulings and decrees of the Court this day made and entered in said case No. 2902, in relation to the pleas in abatement, and other matters and things incident thereto and connected therewith in said case No. 2902, be deemed, considered and treated as having been made in this case.

And afterwards, to wit, on the 27th day of April, 1905, there was duly filed in said court, a demurrer to indictment, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

COE D. BARNARD,

Defendant.

Demurrer to Indictment.

Now comes the defendant Coe D. Barnard in his own proper person and by Alfred S. Bennett, his attorney, and having heard the indictment in said cause read, demurs to the same and says:

That said indictment and the matter and facts stated therein, in manner and form as the same are so stated and set forth in said indictment, are not sufficient in law, and that the facts stated in said indictment are not sufficient to constitute a crime, and that he, the said defendant, is not bound by the law of the land to answer the same, and that this he is ready to verify.

Wherefore, for want of a sufficient indictment in this behalf, the said defendant prays judgment as to said indictment, and that the same be quashed and adjudged insufficient, and that he be dismissed and discharged from answering the same.

COE D. BARNARD.

United States of America,
District of Oregon,—ss.

I, A. S. Bennett, hereby certify that I am an attorney of the above-entitled court, and that in my opinion said demurrer is well founded in law.

A. S. BENNETT.

Filed April 27, 1905. J. A. Sladen, Clerk U. S. Circuit Court for the District of Oregon.

And afterwards, to wit, on Monday, the 3d day of July, 1905, the same being the 62d judicial day of the regular April, 1905, term of said Court—Present, the Honorable JOHN J. DE HAVEN, United States District Judge for the Northern District of California, presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 2941—July 3, 1905.

THE UNITED STATES OF AMERICA,

vs.

COE D. BARNARD,

Order Setting Demurrer to Indictment for Hearing.

Now, at this day, it is ordered that the hearing of this cause upon the demurrer of the defendant to the indictment herein be, and the same is hereby, set for Wednesday, July 5, 1905, at 10 o'clock, A. M.

And afterwards, to wit, on Wednesday, the 5th day of July, 1905, the same being the 63d judicial day of the regular April, 1905, term of said Court—Present, the Honorable JOHN J. DE HAVEN, United States District Judge for the Northern District of California, presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 2941—July, 5, 1905.

THE UNITED STATES OF AMERICA,

vs.

COE D. BARNARD,

Order Setting Demurrer to Indictment for Hearing.

Indictment: Section 5392, R. S., U. S.

Now, at this day, on motion of Mr. Francis J. Heney, United States Attorney, it is ordered that this cause be, and the same is hereby, set for hearing upon the demurrer of said defendant to the indictment herein on Thursday, July 6, 1905, at 10 o'clock, A. M.

And afterwards, to wit, on Thursday, the 6th day of July, 1905, the same being the 64th judicial day of the regular April, 1905, term of said Court—Present, the Honorable JOHN J. DE HAVEN, United States District Judge for the Northern District of California, presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 2941—July 6, 1905.

THE UNITED STATES OF AMERICA,

vs.

COE D. BARNARD,

Order Submitting Cause.

Indictment: Section 5392, R. S., U. S.

Now, at this day, comes the plaintiff by Mr. Francis J. Heney, United States Attorney, and the defendant not appearing, it is ordered that this cause be submitted to the Court upon demurrer of said defendant to the indictment herein without argument.

And afterwards, to wit, on Monday, the 10th day of July, 1905, the same being the 67th judicial day of the regular April, 1905, term of said Court—Present, the Honorable JOHN J. DE HAVEN, United States District Judge for the Northern District of California, presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 2941—July 10, 1905.

THE UNITED STATES OF AMERICA,

vs.

COE D. BARNARD.

Order Overruling Demurrer to Indictment.

Indictment: Section 5392, R. S,, U. S.

This cause was submitted to the Court upon the demurrer of said defendant to the indictment herein without argument and the Court having considered said demurrer and being fully advised in the premises, it is ordered, that said demurrer be, and the same is hereby overruled.

And afterwards, to wit, on Thursday, the 28th day of September, 1905, the same being the 136th judicial day of the regular April, 1905, term of said Court—Present, the Honorable WILLIAM H. HUNT, United States District Judge for the District of Montana, presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 2941—September 28, 1905.

THE UNITED STATES OF AMERICA,

vs.

COE D. BARNARD.

Plea.

Indictment: Section 5392, R. S., U. S.

Now, at this day, comes the above-named plaintiff by Mr. Francis J. Heney, United States Attorney, and the defendant by Mr. A. S. Bennett, of counsel, and, thereupon, through his said attorney, said defendant enters his plea of "not guilty" to the indictment filed herein.

And afterwards, to wit, on Wednesday, the 11th day of July, 1906, the same being the 80th judicial day of the regular April, 1906, term of said Court—Present, the Honorable WILLIAM H. HUNT, United States District Judge for the District of Montana, presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 2941—July 11, 1906.

THE UNITED STATES OF AMERICA,

vs.

COE D. BARNARD.

Order Setting Cause for Trial.

Indictment: Section 5392, R. S., U. S.

Now, at this day, on motion of Mr. Francis J. Heney, Special Assistant to the Attorney General, it is ordered that the trial of this cause be, and the same is hereby, set for Monday, July 23, 1906.

And afterwards, to wit, on Wednesday, the 8th day of August, 1906, the same being the 104th judicial day of the regular April, 1906, term of said Court—Present, the Honorable WILLIAM H. HUNT, United States District Judge for the District of Montana, presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 2941—August 8, 1906.

THE UNITED STATES OF AMERICA,

vs.

COE D. BARNARD.

Trial.

Indictment: Section 5392, R. S., U. S.

Now, at this day, comes the above-named plaintiff by Mr. Wm. C. Bristol, United States Attorney, and the defendant herein, Coe D. Barnard, in his own proper person, and by Mr. A. S. Bennett, of counsel, and this being the day set for the trial of this cause, now come the following named jurors to try the issues joined, to wit: Rudolph Hochuli, William S. Beattie, J. G. Boos, Louis G. Clarke, T. Scott Brooke, Chester H. Bateman, Amos T. Huggins, Wm. A. Gröndahl, Ben C. Holladay, Walter

McMonies, H. C. Wortman, and Joseph W. Howell—twelve good and lawful men of the district, who, being accepted by both parties, duly impaneled and sworn, proceed to hear the evidence adduced, and the hour of adjournment having arrived the further trial of this cause is continued until to-morrow, Thursday, August 9, 1906, at 9:30 A. M.

And afterwards, to wit, on Thursday, the 9th day of August, 1906, the same being the 105th judicial day of the regular April, 1905, term of said Court—Present, the Honorable WILLIAM H. HUNT, United States District Judge for the District of Montana, presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 2941—August 9, 1906.

THE UNITED STATES OF AMERICA,

vs.

COE D. BARNARD.

Trial (Resumed).

Indictment: Section 5392, R. S., U. S.

Now, at this day, come the parties hereto with and by their counsel as of yesterday, and the jury impaneled herein being present and answering to

their names, the trial of this cause is resumed, and the hour of adjournment having arrived, the further trial of this cause is continued until to-morrow, Friday, August 10, 1906, at 9:30 A. M.

And afterwards, to wit, on Friday, the 10th day of August, 1906, the same being the 106th judicial day of the regular April, 1906, term of said Court—Present, the Honorable WILLIAM H. HUNT, United States District Judge for the District of Montana, presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 2941—August, 10, 1906.

THE UNITED STATES OF AMERICA,

vs.

COE D. BARNARD.

Trial (Resumed).

Indictment: Section 5392, R. S., U. S.

Now, at this day, come the parties hereto with and by their counsel as of yesterday, and the jury impaneled herein being present and answering to their names, the trial of this cause is resumed, and the hour of adjournment having arrived the further

trial of this cause is continued until to-morrow, Saturday, August 11, 1906, at 9:30 A. M.

And afterwards, to wit, on Saturday, the 11th day of August, 1906, the same being the 107th judicial day of the regular April, 1906, term of said Court—Present, the Honorable WILLIAM H. HUNT, United States District Judge for the District of Montana, presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 2941—August 11, 1906.

THE UNITED STATES OF AMERICA.

vs.

COE D. BARNARD.

Trial (Resumed).

Indictment: Section 5392, R. S., U. S.

Now, at this day, come the parties hereto with and by their counsel as of yesterday, and the jury impaneled herein being present and answering to their names, the trial of this cause is resumed, and the said jury having heard the evidence adduced, the arguments of counsel, and the charge of the Court, retire from the courtroom under the charge

of proper sworn officers to consider of their verdict, and, after being out a short time, return into Court the following verdict, to wit: "We, the jury in the above-entitled cause, find the defendant, Coe D. Barnard, guilty as charged in the indictment, and we respectfully recommend him to the clemency of the Court. Louis G. Clarke, Foreman," which verdict is received by the Court and ordered to be filed.

And, thereupon, on motion of said defendant, it is ordered that said defendant be and he is hereby allowed 20 days from this date in which to move for a new trial herein. And, it is further ordered that said defendant do appear in this court for sentence, on Wednesday, Aug. 15, 1906.

And afterwards, to wit, on the 11th day of August, 1906, there was duly filed in said court a verdict, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 2941.

THE UNITED STATES OF AMERICA

vs.

COE D. BARNARD

Verdict.

We, the jury in the above-entitled cause, find the defendant, Coe D. Barnard, guilty as charged in the indictment, and we respectfully recommend him to the clemency of the Court.

LOUIS G. CLARKE,
Foreman.

Filed August 11, 1906. J. A. Sladen, Clerk U. S. Circuit Court for the District of Oregon.

And afterwards, to wit, on Wednesday, the 15th day of August, 1906, the same being the 110th judicial day of the regular April, 1906, term of said court—Present, the Honorable WILLIAM H. HUNT, United States District Judge for the District of Montana, presiding—the following proceedings were had in said cause, to-wit:

In the Circuit Court of the United States for the District of Oregon.

No. 2941—August 15, 1906.

UNITED STATES OF AMERICA,

vs.

COE D. BARNARD.

Order Extending Time to File Motion for New Trial, etc.

Indictment: Section 5392, R. S., U. S.

Now, at this day, comes the plaintiff, by Mr. Francis J. Heney, Special Assistant to the Attorney General, and the defendant in his own proper person, and by Mr. A. S. Bennett, of counsel, and this being the day set for imposing sentence upon said defendant, on motion of said plaintiff it is ordered that the time heretofore set for imposing sentence on said defendant, be, and it is hereby, continued to Saturday, August 18, 1906.

And, thereupon, on motion of said defendant, it is ordered that the time heretofore allowed said defendant in which to file a motion for a new trial, be, and the same is hereby, extended to August 25, 1906.

And afterwards, to wit, on Saturday, the 18th day of August, 1906, the same being the 113th judicial day of the regular April, 1906, term of said court—Present, the Honorable WILLIAM H. HUNT, United States District Judge for the District of Montana, presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 2941—August 18, 1906.

THE UNITED STATES OF AMERICA,

vs.

COE D. BARNARD

Order Denying Motion in Arrest of Judgment, Sentence, etc.

Indictment: Section 5392, R. S., U. S.

Now, at this day, comes the above-named plaintiff, by Mr. Francis J. Heney, Special Assistant to the Attorney General, and Mr. William C. Bristol, United States Attorney, and the defendant in his own proper person, and by Mr. A. S. Bennett, of counsel,

And, thereupon, this cause comes on to be heard upon the motion in arrest of judgment of said defendant, and was argued by counsel, on considera-

tion whereof, it is ordered that said motion be, and the same is hereby, denied; whereupon, said defendant excepts to said decision, and said exception is allowed by the Court.

And, thereupon, said plaintiff moves for judgment upon the verdict heretofore entered herein, and it appearing from the verdict of the jury filed herein found the defendant guilty as charged in the indictment herein. Whereupon it is considered that said defendant Coe D. Barnard be imprisoned at hard labor for the term of two years, and that he pay a fine of two thousand dollars ($2,000.00), and it is ordered, until otherwise ordered or provided, the said sentence of imprisonment be executed at the United States penitentiary at McNeil's Island, Washington, and that said defendant stand committed until this sentence be performed or until he be discharged according to law.

And thereupon, on motion of said defendant, it is ordered that said defendant be, and the same is hereby, allowed sixty (60) days from this date in which to prepare, serve and submit his bill of exceptions herein; and,

It is further ordered, that a stay of execution be, and is hereby, allowed said defendant, in this cause, upon his giving a bond in the sum of eight thousand dollars ($8,000.00) within 24 hours from this time,

the said bond to be taken by the clerk of this court, and to be approved by the same officer of the court.

And afterwards, to wit, on the 15th day of February, 1907, there was duly filed in said court a petition for writ of error, in words and figures as follows, to wit:

In the United States Circuit Court for the District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

COE D. BARNARD,

Defendant.

Petition for Writ of Error.

Your petitioner, the above-named Coe D. Barnard, the defendant in the above-entitled cause, brings this his petition for a writ of error, to the Circuit Court of the United States for the District of Oregon, and thereupon your petitioner shows:

That, on the 18th day of August, 1906, there was rendered and entered in the above-entitled court and in the above-entitled cause, a judgment against your petitioner, wherein and whereby your petitioner, the said Coe D. Barnard, was adjudged and sentenced to be imprisoned at

hard labor for a term of two years, and that he pays a fine of $2,000; and your petitioner shows that he is advised by counsel that there was manifest error in the record and proceedings had in said cause, and in the rendition of said judgment and sentence, to the great injury and damage of your petitioner, all of which error will be more fully made to appear by an examination of the said record, and more particularly by an examination of the bill of exceptions by your petitioner tendered, and filed therein, and in the assignment of error thereon, hereinafter set out, and to that end, therefore, that the said judgment, sentence and proceedings may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, your petitioner now prays that a writ of error may be issued, directed therefrom to the said Circuit Court of the United States for the District of Oregon, returnable according to law and the practice of the court, and that there may be directed to be returned pursuant thereto a true copy of the record, bill of exceptions, assignment of errors and all proceedings had in said cause, that the same may be removed into the United States Circuit Court of Appeals for the Ninth Circuit to the end that the error, if any has happened, may be duly corrected, and full and speedy justice done your petitioner.

And your petitioner now makes the assignment of errors attached hereto, upon which he will rely, and which will be made to appear by a return of the said record, in obedience to said writ.

Wherefore, your petitioner prays the issuance of a writ as hereinbefore prayed, and prays that the assignments of errors annexed hereto may be considered as his assignments of error upon the writ, and that the judgment rendered in this cause may be reversed and held for naught, and said cause be remanded for further proceedings.

COE D. BARNARD.

ALFRED S. BENNETT,

Attorney for Coe D. Barnard.

Filed February 15, 1907. J. A. Sladen, Clerk U. S. Circuit Court for the District of Oregon.

And afterwards, to wit, on the 15th day of February, 1907, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit:

In the United States Circuit Court for the District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

COE D. BARNARD,

Defendant.

Assignment of Errors.

Now comes Coe D. Barnard, defendant, in the above-entitled cause, and plaintiff in error herein, having petitioned for an order from said Court permitting him to procure a writ of error to this Court, directed from the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and sentence made and entered in said cause against the said Coe D. Barnard, plaintiff in error, and petitioner herein, now makes and files herein with the petition, the following assignments of error herein, upon which he will rely for the reversal of said judgment and sentence upon the said writ; and says that

in the record and proceedings in the above-entitled cause upon the hearing and determination thereof in the Circuit Court of the United States for the District of Oregon, there was and is manifest error in this, to wit:

First.—That the said Circuit Court erred in overruling the demurrer of the said defendant Coe D. Barnard to the indictment filed in the said cause, demurring to the said indictment.

Second.—In overruling the objection of the said defendant to the question asked the witness E. A. Putnam as folows:

Q. State whether or not there was anything in that conversation that showed, or tended to show, where Watson had been about that time or immediately preceding it?

And in permitting the witness to answer the question as follows:

A. He said he had his foot cut at the time—he said he had been working on the Columbia River, down about St. Helens, somewhere, and said he was going home and going out to where his folks lived.

Third.—In overruling the defendant's objection to the following question asked of the witness:

Q. Did he say where that was?

And in permitting the witness to answer the same:

A. Yes, sir, out towards Forest Grove, out in Washington County.

Fourth.—In overruling the defendant's objection to the following question asked of the said witness:

Q. What was the logging camp, did he state?

And in permitting the witness to answer the same:

A. It was somewheres about St. Helens, somewhere down about in there, I think it was.

Fifth.—In overruling the objection of the defendant to the question asked of one William Shepard while on the stand as a witness for the Government in said cause, the question was as follows:

Q. And did he state at that time, or in connection with that same matter, while you were conversing, the reason why he didn't go back to it?

And in permitting the witness to answer the same as follows:

A. Well, he asked me how it would be for him to go back there, and I answered, if you are making a good living here and trying to be honest you had better stay where you are.

Sixth.—In overruling the defendant's objection to the following question asked the witness Shepard:

Q. What was the rest of the conversation, if any?

And in permitting the witness to answer the same as follows:

A. Well, it was about the horses he brought down. I asked him what prices he got for them, and so on.

Seventh.—In overruling the objection of the defendant to the question asked of the said witness Shepard as follows:

Q. What was the fact about their saying anything at that time about the ranch?

And in permitting the witness to answer the same as follows:

A. He said he wanted to go back and prove up.

Eighth.—In overruling the defendant's objection to the question asked of the said witness as follows:

Q. Did he say why?

And in permitting said witness to answer the same as follows:

A. He said parties wanted him to go back and prove up.

Ninth.—In overruling the defendant's objection to the question asked of the witness as follows:

Q. Did he say why?

And in permitting the said witness to answer the same asme as follows:

A. He said parties wanted him to go back.

Tenth.—In overruling the objection of the defendant to the following question asked the said witness:

Q. Whom did he say wanted him to go back?

And in permitting said witness to answer the same:

A. He had reference to Mr. Hendricks.

Eleventh.—In overruling the defendant's objection to the question asked the said witness as follows:

Q. And did he give you any reason as to why he would not go back?

And in permitting said witness to answer the same:

A. He didn't think the people wanted him, I guess.

Twelfth.—In overruling the defendant's objection to the question asked of said witness, as follows:

Q. Did he tell you why?

And in permitting said witness to answer the same, as follows:

A. No, he didn't tell me exactly.

Thirteenth.—In overruling defendant's objection to the question asked of said witness as follows:

Q. Did he give you any reason why?

And in permitting said witness to answer the same:

A. Well, all the reason was that there were some horses run off that spring, and he was hired to do it, and he didn't suppose the settlers wanted him to go back.

Fourteenth.—In overruling and denying the motion of the defendant to strike out the conversation between the said witness Shepard and Watson, on the ground that the same was incompetent and hearsay against the defendant, and to the ruling of the Court that the same was competent and relevant and admissible as bearing on the question or the residence of by Watson.

Fifteenth.—In overruling the defendant's objection to the question asked of the witness John Morgan as follows:

Q. Whereabouts?

And in permitting said witness to answer said question:

Sixteenth.—In overruling the defendant's objection to the offer of the District Attorney to show that, "At the time the witness proved up, C. D. Barnard was one of the witnesses, at that time we will show that this witness never had resided and never did reside on that claim, we will show it as a similar act."

And in holding that the same was competent and material.

Seventeenth.—In overruling the defendant's objection to the question asked the said witness as follows:

Q. What is the fact Mr. Morgan as to who your witnesses were at the time you made this purported proof.

Eighteenth.—In overruling the defendant's objection to the final proof papers of the said John Morgan and in permitting the same to be offered, received and read in evidence.

Nineteenth.—In overruling the objection of the defendant to the question asked of the said witness Morgan as follows:

Q. Now, as to the homestead, Mr. Morgan, that is covered by Government's Exhibit "A," which you have identified, tell the Court and jury as to what is the fact as to whether or not you ever established an actual residence upon it, ever cultivated it or actually continued to reside upon it for the period set forth in this proof?

And in permitting said witness to answer the same:

A. No, I didn't live on it—I did not cultivate it.

Twentieth.—In overruling the defendant's objection to the following question asked of the witness, Morgan:

Q. I notice question 12, "Have you sold, conveyed, or mortgaged any portion of the land and if so to whom, and for what purpose," and I see the answer is written, no. At the time you made your proof what is the fact as to your having any agreement as to your claim?

And in permitting the witness to answer the said question:

A. Well, I had taken the claims for the Butte Creek Company.

And in the ruling of the said Court holding said question, and answer proper and competent as tending to show system, knowledge, and intent upon the part of the defendant.

Twenty-first.—In overruling the defendant's objection to the following question asked of the witness, Morgan:

Q. What Butte Creek Company?

And in permitting the witness to answer the same, as follows:

A. The Butte Land, Livestock and Lumber Company.

Twenty-second.—In overruling the defendant's objection to the following question asked of said witness:

Q. How did you come to take it for it?

And in permitting the said witness to answer the same as follows:

A. Well, Mr. Zachary asked me to take it up and that is how I came to take it up.

Twenty-third.—In overruling and denying defendant's motion to strike out the aforesaid answer of the witness that "Well, Mr. Zachary asked me if I would take it up and that is how I came to take it up," upon the ground that the same is incompetent, and immaterial and in not allowing the said motion.

Twenty-four.—In overruling the defendants objection to the question asked of the witness James S. Stewart, as follows:

Q. State whether or not you recognized it. (Government's Exhibit "A.")

And in permitting the said witness to answer the same:

A. It is the homestead proof made by John Morgan before me.

Twenty-fifth.—In overruling the defendant's objection to the question asked of the said witness James S. Stewart as follows:

Q. Does it show the accompanying testimony adduced from his witnesses in reference to the same matter?

And in permitting the said witness to answer the same:

A. Yes, sir.

Twenty-sixth.—In overruling the defendant's objection to the question asked of the said witness as follows:

Q. State who the witnesses were who appeared before you at the time and if not at the same time, about the same time in connection with the matter?

And in permitting the said witness to answer the same:

A. One is Robert Zachary and one is Coe Barnard.

Twenty-seventh.—In overruling the defendant's objection to the following question asked of the said witness?

Q. Inform the jury as to what the fact is as to whether the Coe Barnard is the same Coe Barnard, the defendant in this case?

And in permitting the said witness to answer the same:

A. Yes, sir.

Twenty-eighth.—In overruling the defendant's objection to the following question asked the said witness:

Q. Who signed it?

And in permitting the said witness to answer the same:

A. Mr. Barnard.

Twenty-ninth.—In overruling the defendant's objection to the following question asked of the said witness, James S. Stewart, called as a witness for defendant on his cross-examination:

Q. What homestead do you know?

And in permitting him to answer the same:

A. The homestead described here (indicating the final proof which had been shown him).

Thirtieth.—In overruling the defendant's objection to that part of the question asked of the said witness Stewart, on said cross-examination in which the said witness was asked to state as to what he knew as to what Coe D. Barnard had sworn, of his own knowledge, the question being as follows:

Q. What is the fact Mr. Stewart, what is the fact as to whether or not you have heard or know whether Coe D. Barnard on or about the 23d day of June, 1905, before you as United States Commissioner

gave any testimony under oath in the matter before you?

And in permitting the witness to answer the same:

Thirty-first.—In overruling the defendant's objection to the admission of the final proof papers of Coe D. Barnard, which were as follows:

4—369.

HOMESTEAD PROOF——TESTIMONY OF CLAIMANT.

Coe D. Barnard, being called as a witness in his own behalf in support of homestead entry No. 6766, for NW. ¼ NE. ¼ E. ½ NW. ¼ and NW. ¼ NW. ¼, Sec. 32, Tp. 6 S., R. 20 E., W. M., testifies as follows:

Ques. 1.—What is your name, age, and postoffice address?

Ans. Coe D. Barnard; age 31; Fossil, Oregon.

Ques. 2.—Are you a native-born citizen of the United States, and if so, in what State or Territory were you born?*

Ans. Yes; Oregon.

Ques. 3.—Are you the identical person who made homestead entry No. 6766, at the Dalles, Oregon land office on the 6th day of September, 1898, and what is the true description of the land now claimed by you?

* In case the party is of foreign birth a certified transcript from the court records of his declaration of intention to become a citizen, or of his naturalization, or a copy thereof, certified by the officer taking this proof, must be filed with the case. Evidence of naturalization is only required in final (five-year) homestead cases.

Ans. NW. ¼ NE. ¼, E. ½ and NW. ¼ NW. ¼, NW. ¼, Sec. 32, Tp. 6 S. Range 20 E., W. M.

Ques. 4.—When was your house built on the land and when did you establish actual residence therein? (Describe said house and other improvements which you have placed on the land, giving total value thereof.)

Ans. House built in Nov. 1898. Established residence Nov. 1898. Lumber house, 12 by 16 ft. one room, one door and one window good lumber floor, walls ceiled and papered. Stovepipe goes through roof; roof is well protected from fire. Abundance of Spring water. House is comfortable and habitable at all seasons of the year. Good barn 40 feet long, 20 ft. built of lumber and roofed with clapboards, chicken-house and closet, 120 acres fenced with three wires fence, 20 acres plowed good garden with large berry bushes. Total value of improvements $800.00.

I have pastured about 50 head of my cattle on my place on an average each year—sometimes more and sometimes less.

Ques. 5.—Of whom does your family consist; and have you and your family resided continuously on

the land since first establishing residence thereon? (If unmarried, state the fact.)

Ans. Myself, wife and two small children. Yes, except as stated below.

Ques. 6.—For what period or periods have you been absent from the homestead since making settlement, and for what purpose; and if temporarily absent, did your family reside upon and cultivate the land during such absence?

Ans. Myself and family were gone a month in the spring of 1903, visiting relatives in Southern Oregon. It was the month of April, 1903.

Ques. 7.—How much of the land have you cultivated each season, and for how many seasons have you raised crops thereon?

Ans. 20 Acres. Six years. Grain crop each year.

Ques. 8.—Is your present claim within the limits of an incorporated town or selected site of a city or town, or used in any way for trade and business?

Ans. No.

Ques. 9.—What is the character of the land? Is it timber, mountainous, prairie, grazing, or ordinary agricultural land? State its kind and quality, and for what purpose it is most valuable.

Ans. Mostly grazing land—hilly.

Ques. 10.—Are there any indications of coal, salines, or minerals of any kind on the land? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans. No.

Ques. 11.—Have you ever made any other homestead entry? (If so, describe the same.)

Ans. No.

Ques. 12.—Have you sold, conveyed, or mortgaged any portion of the land; and if so, to whom and for what purpose?

Ans. No.

Ques. 13.—Have you any personal property of any kind elsewhere than on this claim? (If so, describe the same, and state where the same is kept.)

Ans. None except horses and cattle on the range.

Ques. 14.—Describe by legal subdivisions, or by number, kind of entry, and office where made, any other entry or filing (not mineral), made by you since August 30, 1890.

Ans. No.

[Sign plainly with full Christian name.]

COE D. BARNARD.

I hereby certify that the foregoing testimony was read to the claimant before being subscribed, and was sworn to before me this 23 day of June, 1904, at my office at Fossil, in Wheeler County, Oregon.

[See note below.] JAS. S. STEWART,
U. S. Commissioner for Oregon.

NOTE.—The officer before whom the testimony is taken should call the attention of the witness to the following section of the Revised Statutes, and state to him that it is the purpose of the Government, if it be ascertained that he testified falsely, to prosecute him to the full extent of the law.

Title LXX.—CRIMES.—Ch. 4.

Sec. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment at hard labor, not more than five years, and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See § 1750.)

FINAL AFFIDAVIT REQUIRED OF HOMESTEAD CLAIMANTS.

SECTION 2291 OF THE REVISED STATUTES OF THE UNITED STATES.

I, Coe D. Barnard, having made a homestead entry of the NW. ¼, NE. ¼, E. ½ of NW. ¼, and NW. ¼, NW. ¼; Section No. 32 in Township No. 6 S. of Range No. 20 E., W. M., subject to entry at The Dalles Oregon Land Office under section No. 2289 of

the Revised Statutes of the United States, do now apply to perfect my claim thereto by virtue of section No. 2291 of the Revised Statutes of the United States; and for that purpose do solemnly swear that I am a native-born citizen of the United States; that I have made actual settlement upon and have cultivated and resided upon said land since the ——— day of ———, 19——, to the present time; that no part of said land has been alienated, except as provided in section 2288 of the Revised Statutes; but that I am the sole bona fide owner as an actual settler; that I will bear true allegiance to the Government of the United States; and, further, that I have not heretofore perfected or abandoned an entry made under the homestead laws of the United States.

[Sign plainly with full Christian name.]

COE D. BARNARD.

I, Jas. S. Stewart, of Fossil, Oregon, do hereby certify that the above affidavit was subscribed and sworn to before me this 23d day of June, 1904, at my office at Fossil, in Wheeler County, Oregon.

JAS. S. STEWART,
U. S. Com. for Oregon.

[Endorsed]: 4—369. Homestead Proof. Land Office at The Dalles Oregon. Original Application No. 6766. Final Certificate No.———. Approved:

————, Register. ————, Receiver. Suspended Pending Investigation by Special Agent Thos. B. Nuhausen. Michael T. Noland, Register. Annie M. Lang, Receiver.

4—369.

HOMESTEAD PROOF—TESTIMONY OF WITNESS.

Clyde Glass, being called as witness in support of the homestead entry of Coe D. Barnard for NW. ¼ NE. ¼, E. ½ NW. ¼ and NW. ¼ NW. ¼, Sec. 32, Tp. 6 S., R. 20 E., W. M., testifies as follows:

Ques. 1.—What is your name, age, and postoffice address?

Ans. Clyde Glass; age 31; Fossil, Oregon.

Ques. 2.—Are you well acquainted with the claimant in this case and the land embraced in his claim?

Ans. Yes.

Ques. 3.—Is said tract within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business?

Ans. No.

Ques. 4.—State specifically the character of this land—whether it is timber, prairie, grazing, farming, coal, or mineral land.

Ans. Principally grazing—hilly.

Ques. 5.—When did claimant settle upon the homestead, and at what date did he establish actual residence thereon?

Ans. In fall of 1898—established residence that year—long about December.

Ques. 6.—Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried, state the fact.)

Ans. Yes. I lived on the place working for Mr. Barnard for 2 or 3 years. I now live about 14 miles from it.

Ques. 7.—For what period or periods has the settler been absent from the land since making settlement, and for what purpose; and if temporarily absent, did claimant's family reside upon and cultivate the land during such absence?

Ans. None.

Ques. 8.—How much of the homestead has the settler cultivated, and for how many seasons did he raise crops thereon?

Ans. About 20 acres—raised grain crops for six years.

Ques. 9.—What improvements are on the land, and what is their value?

Ans. Good lumber house, board roof, size of house 12x16; good lumber floor, inside ceiled and papered; good spring water; one door and one window in

house; good lumber barn, size 40x20; chicken-house and other outbuildings; 120 acres of place fenced with good 3 wire fence. Total value of improvements, $750 or $800.

Ques. 10.—Are there any indications of coal, salines, or minerals of any kind on the homestead? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans. No.

Ques. 11.—Has the claimant mortgaged, sold, or contracted to sell, any portion of said homestead?

Ans. No.

Ques. 12.—Are you interested in this claim; and do you think the settler has acted in entire good faith in perfecting this entry?

Ans. No. Yes.

[Sign plainly with full Christian name.]

CLYDE GLASS.

I hereby certify that the foregoing testimony was read to the witness before being subscribed, and was sworn to before me this 23d day of June, 1904, at my office at Fossil, in Wheeler County, Oregon.

[See note on fourth page.]

JAS. S. STEWART,
U. S. Com. for Oregon.

(The testimony of witnesses must be taken at the same time and place and before the same officer as claimant's final affidavit. The answers must be full and complete to each and every question asked, and officers taking testimony will be expected to make no mistakes in dates, description of land, or otherwise.)

4—369.

HOMESTEAD PROOF—TESTIMONY OF WITNESS.

Clarence B. Zachary, being called as witness in support of the homestead entry of Coe D. Barnard for NW. ¼ NE. ¼, E. ½ NW. ¼, and NW. ¼ of NW. ¼, Sec. 32, Tp. 6 S., R. 20 E., W. M., testifies as follows:

Ques. 1.—What is your name, age, and postoffice address?

Ans. Clarence B. Zachary; age 39; Fossil, Oregon.

Ques. 2.—Are you well acquainted with the claimant in this case and the land embraced in his claim?

Ans. Yes.

Ques. 3.—Is said tract within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business?

Ans. No.

Ques. 4.—State specifically the character of this land—whether it is timber, prairie, grazing, farming, coal, or mineral land.

Ans. Principally grazing land.

Ques. 5.—When did claimant settle upon the homestead, and at what date did he establish actual residence thereon?

Ans. In fall of 1898. Established residence then.

Ques. 6.—Have claimant and family resided con-

tinuously on the homestead since first establishing residence thereon? (If settler is unmarried, state the fact.)

Ans. Yes. I live four miles from settler's homestead.

Ques. 7.—For what period or periods has the settler been absent from the land since making settlement, and for what purpose; and if temporarily absent, did claimant's family reside upon and cultivate the land during such absence?

Ans. None.

Ques. 8.—How much of the homestead has the settler cultivated, and for how many seasons did he raise crops thereon?

Ans. About 20 acres—raised grain on it every year since 1898.

Ques. 9.—What improvements are on the land, and what is their value?

Ans. Lumber house 12x16; lumber roof, one door and one window; good lumber floor, inside ceiled and papered; stove pipe passes through roof in safe condition; abundance of good spring water, lumber barn 40x20 ft.; clapboard roof chicken house, 20 acres plowed, 120 acres fenced with three wire fence. Total value of improvements $800.00.

Ques. 10.—Are there any indications of coal, salines, or minerals of any kind on the homestead? (If so, describe what they are, and state whether the

land is more valuable for agricultural than for mineral purposes.)

Ans. Not that I know of.

Ques. 11.—Has the claimant mortgaged, sold, or contracted to sell, any portion of said homestead?

Ans. Not that I know of.

Ques. 12.—Are you interested in this claim; and do you think the settler has acted in entire good faith in perfecting this entry?

Ans. No—yes.

[Sign plainly with full Christian name.]

CLARENCE B. ZACHARY.

I hereby certify that the foregoing testimony was read to the witness before being subscribed, and was sworn to before me this 23d day of June, 1904, at my office at Fossil, in Wheeler County, Oregon.

[See note on fourth page.]

JAS. S. STEWART,

U. S. Com. for Oregon.

(The testimony of witnesses must be taken at the same time and place and before the same officer as claimant's final affidavit. The answers must be full and complete to each and every question asked, and officers taking testimony will be expected to make no mistakes in dates, description of land, or otherwise.)

And in permitting the same to be offered as a part of the cross-examination of the said witness and to be received and read in evidence therein.

Thirty-second.—In refusing to instruct the jury in said cause as follows:

"If the defendant thought that going upon the land and staying once in six months was a continuous residence within the meaning of the law, you should consider that fact in passing upon his good faith, and if you have a reasonable doubt as to what he believed upon the subject you should give him the benefit of that doubt."

Thirty-third.—In failing and refusing to instruct the jury as requested by the defendant as follows:

"A homestead claimant has a right to lease or let a part of his claim to other parties for cultivation, and doing so before he proves up is no violation of the homestead law."

Thirty-fourth.—In failing and refusing to instruct the jury in said cause as follows; as requested by defendant:

"The cultivation by a tenant or agent in good faith might be a sufficient cultivation within the meaning of the law."

Thirty-fifth.—In failing and refusing to instruct the jury as requested by the defendant as follows:

"An enclosure made by joining a fence to a bluff is a fencing within the meaning of the law."

Thirty-sixth.—In failing and refusing to instruct said jury as requested by the defendant as follows:

"In this case I charge you that the indictment is insufficient to sustain a verdict of guilty, and you should find the defendant not guilty."

Thirty-seventh.—In failing and refusing to instruct the jury as requested by the defendant as follows:

"You should not permit any clamor or public opinion, real or imagined, to prevent you from giving the defendant a fair trial, and the benefit of all reasonable doubt."

Thirty-eighth.—In failing and refusing to instruct the said jury as requested by the defendant as follows:

"No mere carelessness or recklessness on the part of the defendant in giving his evidence in the Watson final proof will sustain the charge of perjury in this case, but it will be made to appear beyond a reasonable doubt that his statements were willfully and intentionally false, and that he did not believe them to be true."

Thirty-ninth.—In failing and refusing to instruct said jury as requested by the said defendant as follows:

"You have no right to consider the homestead proof of Barnard, upon his own land as bearing in any way upon his honesty and integrity or truth and veracity, you can only consider it as bearing upon the credibility of the witness Stewart."

Fortieth.—In failing and refusing to instruct said jury as requested by the said defendant as follows:

"You cannot find the defendant guilty of perjury

in the matter of the statement that there was about two acres in cultivation."

Forty-first.—In failing and refusing to instruct said jury as requested by the defendant as follows:

"You cannot find the defendant guilty in this cause on account of any falsity, real or supposed as to the statement in the proof that there was a house or fencing on the land."

Forty-second.—That the Court erred in instructing the jury as follows:

"Consider the specific answers made to the questions I have read, not only as to the general question of good faith, but as to the particular acts that he testifies to concerning Watson's settlement and cultivation."

Forty-third.—That said Court erred in instructing the jury in relation to the evidence of other offenses, as follows:

"But I repeat such evidence was offered and admitted and must be limited in your consideration to its relevancy as to the design or intent, or knowledge, or system, that the defendant may have had in doing the particular act charged against him."

Forty-fourth.—That the Court erred in refusing defendant's motion in arrest of judgment in said cause and in not allowing the same.

Forty-fifth.—That the Court erred in refusing defendant's motion to set aside the verdict and for a

new trial in said cause, and for not allowing said motion.

Forty-sixth.—That the Court erred in pronouncing sentence against said defendant.

COE D. BARNARD,
Plaintiff in Error.
ALFRED S. BENNETT,
Attorney for Plaintiff in Error.

United States of America,
District of Oregon,—ss.

I hereby certify that the foregoing assignments of error are made on behalf of the petition for a writ of error herein, and are, in my opinion, well taken, and the same now constitute the assignment of errors upon the writ prayed for.

ALFRED S. BENNETT,
Attorney for Plaintiff in Error.

Filed February 15, 1907. J. A. Sladen, Clerk U. S. Circuit Court for the District of Oregon.

And afterwards, to wit, on the 15th day of February, 1907, there was duly filed in said court a supersedeas bond, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

COE D. BARNARD,

Defendant.

Supersedeas Bond.

Know all men by these presents, that we, Coe D. Barnard, of Fossil, State of Oregon, as principal, and Thomas A. Rhea of Portland, State of Oregon, and Columbus A. Rhea of Portland, State of Oregon as sureties, are held and firmly bound unto the United States of America in the full and just sum of $8,000, to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents:

Sealed with our seals and dated this 15th day of Feb. in the year of our Lord, one thousand nine hundred and seven.

Whereas, lately at the April term, A. D. 1906, of the Circuit Court of the United States for the District of Oregon in the suit pending in said court between the United States of America, and Coe D. Barnard, defendant, a judgment and sentence was rendered against the said Coe D. Barnard, and the said Coe D. Barnard has obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the United States of America to be and appear in the said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, 30 days from and after the day of said citation, which citation has been duly served.

Now the condition of the above obligation is such that if the said Coe D. Barnard shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in said court and prosecute his writ of error, and shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence against him shall be affirmed; and if he shall appear for trial in the Circuit Court of the United

States for the District of Oregon on such day or days as may be appointed for the retrial by said Circuit Court, and abide by and obey all orders made by said Court, provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit; then the above obligation to be void; otherwise to remain in full force, virtue and effect.

COE D. BARNARD. [Seal]
THOMAS A. RHEA. [Seal]
COLUMBUS A. RHEA. [Seal]

Signed, sealed and delivered in the presence of:

_____,

Signed, sealed and acknowledged this 15th day of Feb. 1907, before me.

[Seal] J. A. SLADEN,
Clerk United States Circuit Court, District of Oregon.

United States of America,
District of Oregon,—ss.

I, Thomas A. Rhea, being duly sworn, depose and say that I am a resident and freeholder within said district, and that I am worth in property situate therein the sum of eight thousand dollars ($8,000) over and above all my just debts and liabilities and exclusive of property exempt from execution.

THOMAS A. RHEA.

Subscribed and sworn to before me this 15th day of February, 1907.

[Seal] J. A. SLADEN,

Clerk United States Circuit Court, District of Oregon.

United States of America,
District of Oregon,—ss.

I, Columbus A. Rhea, being duly sworn, depose and say that I am a resident and freeholder within said district, and that I am worth in property situate therein the sum of eight thousand dollars ($8,000) over and above all my just debts and liabilities and exclusive of property exempt from execution.

COLUMBUS A. RHEA.

Subscribed and sworn to before me this 15th day of February, 1907.

[Seal] J. A. SLADEN,

Clerk United States Circuit Court, District of Oregon.

Filed February 15, 1907. J. A. Sladen, Clerk U. S. Circuit Court for the District of Oregon.

And afterward, to wit, on Friday, the 15th day of February, 1907, the same being the 97th judicial day of the regular October, 1906, term of said Court—Present, The Honorable CHARLES E. WOLVERTON, United States District Judge for the District of Oregon, presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

COE D. BARNARD.

Defendant.

Order Allowing Writ of Error.

Now, at this time, comes the defendant, Coe D. Barnard, by Alfred S. Bennett, his attorney, and presents to the Court his petition praying for the allowance of a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, to the above-entitled court and the above-entitled cause, and has submitted therewith his assignment of errors, and his bond for appearance in the sum of $8,000.00 (that being the amount of bail hertofore fixed by the Court).

Whereupon it is ordered that said bond be accepted and approved, and that the prayer of said petitioner be granted, and that the clerk of the court be and he is hereby, directed to issue the writ of error prayed for in said petition, and that sentence and execution in said cause be stayed until the final disposition of said writ in said United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 15th day of February, 1907.

CHARLES E. WOLVERTON,

District Judge sitting as Circuit Judge.

Filed February, 15, 1907. J. A. Sladen, Clerk U. S. Circuit Court for the District of Oregon.

And afterwards, to wit, on Friday, the 15th day of February, 1907, the same being the 97th judicial day of the regular October, 1906, term of said Court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge for the District of Oregon, presiding—the following proceedings were had in said cause, to wit:

In the United States Circuit Court for the District of Oregon.

COE D. BARNARD,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Order Extending Time of Return to Writ of Error.

United States of America,

District of Oregon,—ss.

Whereas, the above-named defendant, Coe D. Barnard, has filed a petition for a writ of error in the above-entitled cause from the United States Circuit Court of Appeals for the Ninth Circuit, to the above-entitled court; and,

Whereas, said writ has been allowed and the assignment of errors filed and citation issued and served, and a writ of error issued in said cause; and,

Whereas, the proposed bill of exceptions in said cause has been duly filed and served, but owing to the absence of the judge who tried the case from the district the same has not been settled; and,

Whereas, it is manifestly impossible to perfect and prepare the transcript within the time allowed for the return of said writ,

Now, therefore, the time for returning said writ and docketing said cause in the said Circuit Court of Appeals and preparing and transmitting the record in said cause to the above-named Circuit Court of Appeals is hereby extended until the 15th day of May, 1907.

Dated at Portland, Oregon, this 15th day of February, 1907.

CHAS. E. WOLVERTON,

District Judge Sitting as Circuit Judge.

Filed February 15, 1907. J. A. Sladen, Clerk U. S. Circuit Court for the District of Oregon.

And afterwards, to wit, on the 3d day of May, 1907, there was duly filed in said court, a bill of exceptions, in words and figures as follows, to wit:

In the United States Circuit Court for the District of Oregon.

U. S. OF AMERICA,

Plaintiff,

vs.

COE D. BARNARD,

Defendant.

Bill of Exceptions.

Be it remembered that the above-entitled cause came on for trial upon the indictment on the —— day of ————, 1906, before the Honorable Wm. H. Hunt, Judge, and a jury duly impaneled, and during the trial of said cause and as a part of the government's direct case one E. A. Putnam was called as a witness, who having testified that his name was E. A. Putnam, that he lived in Douglas County at the present time, that he knew the defendant Mr. Barnard, that he had lived in Wheeler County about twenty-six or twenty-seven years, that he knew a man by the name of Charles A. Watson, that he saw him in Portland, Oregon, at the Merchants Hotel about the last of April—about the 28th, that there was no other

(Testimony of E. A. Putnam.)

persons present that he was acquainted with, that he had a conversation with Mr. Watson at that time and place and they talked some; whereupon the witness was asked the following question,

Q. State whether or not there was anything in that conversation that showed or tended to show where Watson had been about that time or immediately preceding it?

To which the defendant objected as incompetent and in not any way binding upon the defendant in this cause and as hearsay and as not the best evidence, but the objection was overruled and the defendant excepted.

The Court saying, "It is understood the question is admitted solely as bearing upon the question as to whether or not Watson did state the truth in regard to the answers that he made in making his proof."

Whereupon the witness answered, "He said he had his foot cut at the time—he said he had been working on the Columbia River, down about St. Helens, somewhere, and said he was going home, and going out to where, his folks lived.

Q. Did he say where that was?

Same objection, ruling and exception.

A. Yes, sir, out towards Forest Grove, out in Washington County.

Q. What was the logging camp, did he state?

(Testimony of E. A. Putnam.)

Same objection, ruling and exception.

A. It was somewheres about St. Helens, somewhere down about in there, I think it was.

Said Charles A. Watson had not been called or testified as a witness in said cause and did not testify as a witness therein.

Be it further remembered that during the trial of said cause and as a part of the Government's direct case, one William Shepard was called as a witness and testified that his name was William Shepard, that he lived at Mountaindale, Washington County in Oregon, that that was west of Portland about 23 miles, that he had lived at Mountaindale since 1893, that he went there in the Spring of 1892, that he had met a man by the name of Charles A. Watson, that he had met a man by the name of Coe D. Barnard (witness then identified the defendant Barnard), that he had not resided in the Fossil country since 1902, that he left Wheeler County in June, 1902, that he thought it was on the 19th of June, that he went from there to Mountaindale, that he saw Charles A. Watson round Mountaindale in 1902, that he was hauling lumber for William Hollenbeck from a sawmill on Dairy Creek, pretty nearly north from Mountaindale, 9 miles from Mountaindale, that Watson was there to the best of his knowledge about two weeks hauling timber in June or July, that it was after the third of July when he (the witness) landed there and after

(Testimony of E. A. Putnam.)

the third of July that he saw Watson working for Hollenbeck, that he didn't see Watson after that until he saw him here in Portland, that he saw Watson running a saloon at Greenville in 1901, that Greenville is about 7 or 8 miles from Mountaindale, that he did not know exactly how long Watson was running his saloon there, that he (the witness) landed there about the 21st of June with some horses and returned there about the 25th of July, that he saw Watson there about that time thre or four times, pretty near every day he would go to Greenville with a horse and team, that Watson was running the saloon alone himself, that he had talked with Watson at that time.

Whereupon the following question was asked him:

Q. And did he state at that time, or in connection with that same matter while you were conversing, the reason why he didn't go back to it?

To this the defendant objected on the same grounds as to the testimony of E. A. Putnam, as hereinbefore stated. That is that it was incompetent and not in any way bearing upon the defendant in this case and as hearsay and as not the best evidence. But the objection was overruled and the defendant excepted and the exception was allowed.

Whereupon the witness answered, well, he asked me how it would be for him to go back there, and I answered, if you are making a good living here and trying to honest you had better stay where you are.

(Testimony of E. A. Putnam.)

Q. What was the rest of the conversation, if any? Same objection, ruling and exception.

A. Well, it was about the horses he brought down. I asked him what prices he got for them, and so on.

Q. Horses he had where?

A. Horses he fetched down in 1901.

Q. In 1901 or 1902? A. In 1899.

Q. What horses were they?

A. They were the horses he got of Mr. Barnard.

Q. This same defendant? A. Yes, sir.

Q. Just tell the jury about that, please.

A. About the horses?

Q. Yes; just what you know; not what anybody told you, state the facts.

A. Well, he was working for Barnard and got those horses and brought them down here to sell; there were 17 head of them passed through the gate, going down the hill to my brother's ranch.

Q. When was that?

A. July, about the 17th in the year 1899. These horses were at Mr. Barnard's at the time, I counted them as they went by; I know they were Barnard's horses because I had seen him riding around there breaking them, riding them around the range and gathering up the horses—he fetched the horses to Greenville, at least that is what he said, he might

(Testimony of E. A. Putnam.)

have sold some along the road or traded them off for something.

Q. Was there anything said in any of the conversations you had, did you converse with Watson about that time?

Q. What was the fact about their saying anything at that time about the ranch.

Same objection, as incompetent, not in any way bearing upon the defendant and hearsay. Objection overruled and defendant excepted.

Whereupon the witness answered, he said he wanted to go back and prove up.

Q. Did he say why?

Same objection, ruling and exception.

A. He said parties wanted him to go back and prove up.

Q. Did he say why?

Same objection, ruling and exception.

A. He said parties wanted him to go back.

Q. Whom did he say wanted him to go back?

Same objection, ruling and exception.

A. He had reference to Mr. Hendricks.

Q. And did he give you any reason as to why he would not go back?

Same ruling to objection and exception.

A. He didn't think the people wanted him, I guess.

(Testimony of E. A. Putnam.)

Q. Didn't he tell you why?

A. Same objection, ruling and exception.

A. No, he didn't tell me exactly.

Q. Did he give you any reason why?

Same objection, ruling and exception.

A. Well, all the reason was that there were some horses run off that spring and he was hired to do it and he didn't suppose the settlers wanted him to go back.

Whereupon the counsel for the defendant moved to strike out the conversation between the witness and Watson on the ground that the testimony is incompetent and hearsay against this defendant.

Whereupon the Court asked, "The conversation was all with Watson?" A. Yes, sir.

The COURT.—Its relevancy may be as to the bearing on the question of residence upon the claim by Watson.

Whereupon the Court ruled that for that purpose it was competent and the defendant excepted and the exception was allowed.

And be it further remembered that during the trial of said cause and as a part of the direct case of the Government one John Morgan was called by the Government as a witness, who testified that he had lived

(Testimony of E. A. Putnam.)

in Wheeler county and that he took up a claim in that county.

Whereupon, he was shown what purported to be his final proof paper upon said claim, which was as follows:

Government's Exhibit "A."

4-369.

HOMESTEAD PROOF—TESTIMONY OF CLAIMANT.

John M. Morgan, being called as a witness in his own behalf in support of homestead entry No. 12, 762, for Lot 4, Sec. 30, Lots 1, 2 and 3, Sec. 31, T. 5 S., R. 20 E., W. M., testified as follows:

Q. What is your name, age and postoffice address?

A. John M. Morgan, age 26; Fossil, Oregon.

Q. Are you a native-born citizen of the United States, and if so, in what state or territory were you born? A. Yes, Illinois.

Q. Are you the identical person who made homestead entry No. 12762, at the Dalles, Oregon, land office on the —— day of ————, 1903, and what is the true description of the land now claimed by you?

A. Lot 4, Sec. 30, Lots 1, 2, and 3, Sec. 31, T. 5 S., R. 20 E., W. M.

(Testimony of E. A. Putnam.)

Q. When was your home built on the land, and when did you establish actual residence therein? (Describe said house and other improvements which you have placed on the land, giving total value thereof?)

A. Nov. 1902; established residence in house at same time. 12 x 14 box house, shingle roof, one door and one window, good floor, stovepipe through tin in roof, all fenced with two wires, good spring water, 35 acres plowed, total value of improvements $350.00.

Q. Of whom does your family consist; and have you and your family resided continually on the land since first establishing residence thereon? (If unmarried state the fact.)

A. Myself and wife, yes.

Q. For what period or periods have you been absent from the homestead since making settlement, and for what purpose; and if temporarily absent did your family reside upon and cultivate the land during your absence? A. None.

Q. How much of the land have you cultivated each season, and for how many seasons have you raised crops thereon?

A. Thirty-five acres cultivated; raised two barley crops, last year and this, pastured my stock on place—two horses and 2 cows.

(Testimony of E. A. Putnam.)

Q. Is your present claim within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business?

A. No.

Q. What is the character of the land? Is it timber, mountainous, prairie, grazing, or ordinary agricultural land? State its kind and quality and for what purpose it is most valuable?

A. Grazing and farming, mostly grazing.

Q. Are there any indications of coal, salines, or minerals, of any kind on the land? (If so describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes?)

A. No.

Q. Have you ever made any other homestead entry? (If so, describe the same.)

A. No.

Q. Have you sold, conveyed, or mortgaged any portion of the land, and if so, to whom and for what purpose? A. No.

Q. Have you any personal property of any kind elsewhere than on this claim? (If so, describe the same, and state where the same is kept.)

A. No.

Q. Describe by legal subdivisions, or by number, kind of entry, and of office where made, any other

(Testimony of E. A. Putnam.)

entry or filing (not mineral) made by you since Aug. 30, 1890.

A. Homestead entry N. ½, SW.¼, N. ½ SE. ¼; Sec. 1, T. 6 S., R. 19 E., W. M., which I abandoned soon after filing and relinquished in spring of 1900.

(Sign plainly with full Chrstian name.)

JOHN MORGAN.

(In case the party is of foreign birth, a certified transcript from the court records of his declaration of intention to become a citizen or his naturalization, or a copy thereof, certified by the officer taking this proof, must be filed with the case. Evidence of naturalization is only required in final (five year) homestead cases.)

I hereby certify that the foregoing testimony was read to the claimant before being subscribed and was sworn to before me this 19th day of September, 1904, at my office at Fossil, Wheeler county, Oregon.

(See note below.)

JAS. S. STEWART,
U. S. Com. for Oregon.

NOTE.—The officer before whom the testimony is taken should call attention of the witness to the following section of the Revised Statutes and state to him that it is the purpose of the Government, if it be ascertained that he testified falsely, to prosecute him to the full extent of the law.

(Testimony of E. A. Putnam.)

TITLE LXX-CRIMES CHAPTER 4.

Sec. 5392. Every person, who having taken an oath before a competent tribunal, officer, or person, in any case in which the law of the United States authorized an oath to be administered, that he will testify, declare , depose or certify truly, or that any written testimony, declaration, deposition or certificate, by him subscribed is true, willfully and contrary to such oath, states or subscribes, any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment at hard labor, not more than five years, and shall, moreover, thereafter be incapable of giving testimony in any court of the United States, until such time as the judgment against him is reversed. (See Sec. 1750.)

FINAL AFFIDAVIT REQUIRED OF HOMESTEAD CLAIMANT'S BLANK.

(4-369.)

HOMESTEAD PROOF—TESTIMONY OF WITNESS.

Robert V. Zachary, being called as a witness in support of the homestead entry of John M. Morgan for Lot 4, Sec. 30, Lots 1, 2, and 3, Sec. 31, T. 5 S. R., 20 E., W. M., testifies as follows:

(Testimony of E. A. Putnam.)

Q. What is your name, age and postoffice address?

A. R. V. Zachary, age 53, Fossil, Oregon.

Q. Are you well acquainted with the claimant in this case and the land embraced in his claim?

A. Yes.

Q. Is said tract within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or busines? A. No.

Q. State specifically the character of this land—whether it is timber, prairie, grazing, farming, coal or mineral land.

A. Grazing and farming; mostly grazing land.

Q. When did claimant settle upon the homestead and at what date did he establish actual residence thereon?

A. In the fall of 1902, established residence at that time. I live six miles from settler, my stock ranges round his place. He is one of my nearest neighbors.

Q. Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried, state the fact.)

A. Yes.

Q. For what period or periods has the settler been absent from the land since making settlement, and

(Testimony of E. A. Putnam.)

for what purpose; and if temporarily absent, did claimant's family reside upon and cultivate the land during such absence? A. None.

Q. How much of the homestead has the settler cultivated, and for how many seasons did he raise crops thereon?

A. Thirty-five acres, raised two grain crops—1903 and 1904.

Q. What improvements are on the land, and what is their value?

A. A good lumber house 12 x 14 feet, shingle roof one floor and a window, good floor; stovepipe goes through tin roof; all fenced with two wires, good spring water; total value of improvements about $300.00

Q. Are there any indications of coal, salines, or minerals of any kind on the homestead? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.) A. No.

Q. Has the claimant mortgaged, sold, or contracted to sell, any portion of said homestead?

A. Not that I know of.

(Testimony of E. A. Putnam.)

Q. Are you interested in this claim, and do you think the settler has acted in entire good faith in perfecting this entry? A. No. Yes.

ROBERT V. ZACHARY.

I hereby certify that the foregoing testimony was read to the witness before being subscribed, and was sworn to before me this 19th day of September, 1904, at my office at Fossil, in Wheeler county, Oregon.

(See note on fourth page.)

JAS. S. STEWART,
U. S. Com. for Oregon.

(The testimony of witness must be taken at the same time and place, and before the same officer, as claimant's final affidavit. The answers must be full and complete to each and every question asked, and officers taking testimony will be expected to make no mistake in dates, description of land or otherwise.)

(4-369.)

HOMESTEAD PROOF—TESTIMONY OF WITNESS.

Coe D. Barnard, being called as witness in support of the homestead entry of John M. Morgan, for Lot 4, Sec. 30, Lots 1, 2 and 3, Sec. 31, T. 5 S., R. 20 E., W. M., testified as follows:

Q. What is your name, age, and postoffice address?

(Testimony of E. A. Putnam.)

A. Coe D. Barnard, age 31, Fossil, Oregon.

Q. Are you well acquainted with the claimant in this case and the land embraced in his claim?

A. Yes, sir.

Q. Is said tract within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business? A. No.

Q. State specifically the character of this land—whether it is timber, prairie, grazing, farming, coal or mineral land. A. Grazing and farming.

Q. When did claimant settle upon the homestead and at what date did he establish actual residence thereon?

A. About November, 1902; established residence in house at that time. I live about eight miles from settler, and my livestock ranges around his place, which I frequently have occasion to pass.

Q. Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried state the fact.) A. Yes.

Q. For what period or periods has the settler been absent from the land since making settlement, and for what purposes; and if temporarily absent, did claimant's family reside upon and cultivate the land during such absence? A. None.

(Testimony of E. A. Putnam.)

Q. How much of the homestead has the settler cultivated, and for how many seasons did he raise crops thereon?

A. About thirty-five acres, two seasons—grain, 1903 and 1904.

Q. What improvements are on the land, and what is their value?

A. Lumber house, 12 x 14 feet, shingle roof, one door and one window, good floor, all fenced with 2 wires fence; stovepipe goes through tin in roof of house, good spring water, total value of improvements, $300.00

Q. Are there any indications of coal, salines, or minerals of any kind on the homestead? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.) A. No.

Q. Has the claimant mortgaged, sold, or contracted to sell, any portion of said homestead?

A. Not that I know of.

Q. Are you interested in this claim; and do you think the settler has acted in entire good faith in perfecting this entry? A. No. Yes.

COE D. BARNARD.

I hereby certify that the foregoing testimony was read to the witness before being subscribed, and was

(Testimony of E. A. Putnam.)

sworn to before me this 19th day of September, 1904, at my office in Fossil, Wheeler county, Oregon.

JAS. S. STEWART,
U. S. Com. for Oregon.

(See note on fourth page.)

(The testimony of witnesses must be taken at the same time and place, and before the same officer, as claimant's final affidavit. The answers must be full and complete to each and every question asked, and officers taking testimony will be expected to make no mistakes in dates, descriptions of land, or otherwise.)

And said witness testified that the said paper bore his signature, that he did not know when he signed it, but that he knew what it was and that it was his proof on his homestead, the one he had taken up.

Whereupon he was asked the following question:

Q. Whereabouts?

To which the defendant objected as immaterial and incompetent.

Whereupon the Court asked the District Attorney, "what is the purpose," to which Mr. Bristol answered, "the purpose is to show—we offer to show by this witness that he took a homestead and that Coe D. Barnard was his witness.

Whereupon the objection was overruled and the defendant excepted and his exception was allowed.

(Testimony of E. A. Putnam.)

Whereupon Mr. Bristol stated, "At the time the witness proved up, C. D. Barnard was one of the witnesses, at that time we will show that this witness never had resided and never did reside on that claim, we will show it as a similar act.

Whereupon the defendant objected as incompetent and immaterial, and tended to prejudice the defendant and in no way bearing on the issue in this case, but the objection was overruled and the defendant excepted.

Whereupon the question was asked of said witness:

Q. What is the fact, Mr. Morgan, as to who your witnesses were at the time you made this purported proof?

Same objection, and that it was not the best evidence, whereupon the Court ruled that the best evidence was the paper itself, whereupon the paper purporting to be said final proof was offered by the Government (said paper hereinbefore set forth), for the same purpose as hereinbefore set forth, to which the defendant objected as immaterial and incompetent and tending to drag in other issues prejudicial to the defendant and not connected in any way with the charge against the defendant.

But the objection was overruled and the defendant excepted, and his exception was allowed, and said

(Testimony of E. A. Putnam.)

document was thereupon received in evidence and marked Government's Exhibit "A."

Whereupon the witness was asked the following question by the Government:

Q. Now, as to the homestead, Mr. Morgan, that is covered by Government's Exhibit "A," which you have identified, tell the Court and jury as to what is the fact as to whether or not you ever established an actual residence upon it, ever cultivated it or actually continued to reside upon it for the period set forth in this proof.

To which there was the same objection, ruling and exception, and the witness answered:

A. No, I didn't live on it—I did not cultivate it.

Whereupon, upon cross-examination, witness testified that he guessed the proof was read over to him, that he did not know whether it had or not, that he might have read it, he didn't remember and didn't remember it being read to him by anybody but it might have been, tha the would not swear it was, that he guessed he swore to something, that he knew he did, that he swore to it.

Q. You were sworn to this, then, were you?

And in answer to the question, "When was your house built on the land, when did you establish actual residence thereon, describe said house and other improvements that you placed on the land and give

(Testimony of E. A. Putnam.)

the total value thereof, did you answer, "in November, 1902, established residence in the house at the same time, 12 x 14, a box-house, shingle roof, one door and two windows, a good floor and stovepipe through the roof, board fence of two wires, spring water, 35 acres plowed, total value of improvements, $350"; did you answer that and swear to it?

A. I don't remember whether I did or not.

Q. Now, in answer to this question, "How much of this land have you cutivated this season and how many seasons have you raised crops thereon," and did you answer "35 acres cultivated, raised two barley crops last year and pastured my stock on the place, two horses and two cows," did you answer that way?

A. I guess I answered it that way, if it is on the paper I must have sworn that way.

Q. You made the answers down on the paper?

A. I guess I did.

Q. And swore to them? What business were you in up there?

A. I was not in any particular business.

Q. You weren't in any business? A. No.

Q. What were you doing?

A. Well, I was living in Fossil.

Q. What was you doing to make a living?

(Testimony of E. A. Putnam.)

A. I didn't say what I was doing to make a living.

Q. What was you doing to make a living?

A. Well, I was gambling a little once in a while.

Q. Gambling to make a living?

A. Not particularly, I didn't have to, no.

Q. Were you doing anything else? A. Yes.

Q. What else?

A. Well, I was painting quite a bit.

Q. What?

A. Painting, house painting—I don't know how much of the time, a good bit of the time, when I could not make any money gambling, well, I went out and painted a house.

Q. And were you ready to swear to anything anybody asked you? A. No.

Whereupon on redirect examination counsel for government asked the following question:

Q. I notice question 12, "Have you sold, conveyed, or mortgaged any portion of the land, and if so to whom, and for what purpose," and I see the answer is written, no. At the time you made your proof what is the fact as to your having any agreement as to your claim?

To which the defendant objected as immaterial and incompetent, and because there was no allegation in

(Testimony of E. A. Putnam.)

the indictment that there was any perjury or anything wrong in relation to the matter of any conveyance of the land, but the Court overruled the objection, and held the testimony relevant and competent, as tending to show system, knowledge, and intent on the part of the defendant, to which ruling the defendant then and there excepted, and the exception was allowed.

The witness answered, "Well, I had taken the claims for the Butte Creek Company."

Q. What Butte Creek Company?

Same objection, ruling and exception.

A. The Butte Land, Livestock and Lumber Company.

Q. How did you come to take it for it?

Same objection and in no way connected with the matter charged against the defendant.

The COURT.—Is the defendant connected with this company?

Mr. BENNETT.—Not in the slightest, your Honor.

Objection overruled, to which ruling of the Court the defendant by his counsel then and there excepted, and the exception was then and there allowed.

Whereupon the witness answered:

A. Well, Mr. Zachary asked me if I would take it up and that is how I came to take it up.

(Testimony of E. A. Putnam.)

Whereupon the defendant moved to strike out the witness' answer and withdraw it from the jury as incompetent, and immaterial, but the objection was overruled and the defendant excepted and the exception was allowed, whereupon the Government moved to expunge from the record all matter concerning the man Zachary and the Court said "let it go out."

There was no testimony offered in the case tending to show that the defendant Barnard was a stockholder or in any other way interested in the Butte Creek Company or Butte Land, Livestock and Lumber Company, and thereafter the witness, James S. Stewart was called by the Government as a part of its direct case and shown Government's Exhibit "A," hereinbefore referred to, and also asked to look at it and state whether or not he recognized it, to which the defendant objected as incompetent, immaterial and hearsay, same ruling and exception.

A. It is the homestead proof made by John Morgan before me.

Q. Does it show the accompanying testimony adduced from his witnesses in reference to the same matter?

Same objection, ruling and exception.

A. Yes, sir.

(Testimony of E. A. Putnam.)

Q. State who the witnesses were who appeared before you at the time and if not at the same time, at about the same time in connection with the matter.

Same objection, ruling and exception.

A. One is Robert Zachary and one is Coe Barnard.

Q. Inform the jury as to what the fact is as to whether the Coe Barnard is the same Coe Barnard, the defendant in this case.

Same objection ruling and exception.

A. Yes, sir.

Q. Who signed it?

Same objection, ruling and exception.

A. Mr. Barnard.

And be it further remembered, that after the Government had rested its case, JAMES STEWART was called as a witness in behalf of the defendant and testified as follows:

Direct Examination.

Q. You have already been sworn?

A. Yes, sir.

Q. You were a witness for the Government here?

A. Yes, sir.

Q. How long have you lived in the Fossil country?

A. Sixteen years.

Q. Are you acquainted with Coe Barnard?

(Testimony of James Stewart.)

A. Yes, sir.

Q. How long have you known Coe?

A. I have known him for a long time.

Q. Do you know what his general reputation in that community has been for truth and veracity?

A. I do.

Q. What has it been, good or bad?

A. It has been good.

Cross-examination.

Q. Do you know where Barnard has lived during all this time? A. Yes, sir.

Q. Where? A. In that Fossil neighborhood.

Q. What do you mean by the Fossil neighborhood, describe it more particularly to the jury?

A. Part of the time in town and part of it on his ranch.

Q. Whereabouts is that ranch?

A. A few miles west of Fossil.

Q. How many?

A. About three, I should think; I am not sure about it.

Q. Is that down, the place you mean down next place known as the J. M. Barnard place on Butte Creek? A. I could not say as to that.

Q. How do you fix the place where Barnard lived?

(Testimony of James Stewart.)

Do you know the section, township and range Mrs. Barnard pointed out as the northwest quarter of section 25, township 6 south, range 20 east?

A. I would not be sure about the section.

Q. Could you tell by looking at the map whether that was the place he lived at?

A. All I know of where he lived at is I have been down to the Barnard place about two times in my life.

Q. How many times? A. Two times.

Q. Do you know how to get there?

A. Down Butte Creek.

Q. Down Butte Creek all the way?

A. You could leave the road a little, sir.

Q. Where did you strike Barnard's place?

A. It is right on the creek.

Q. At what point?

A. What do you mean by at what point?

Q. Do you know here Jim Barnard's homestead used to be? A. No, sir.

Q. Do you know where Will Lakey lived?

A. No, sir.

Q. Do you know where the Winchester place is?

A. No, sir.

Q. Do you know where the old Connell place used to be? A. The old which?

Q. Connell place? A. No, sir.

(Testimony of James Stewart.)

Q. If shown a map, could you point out the place on Butte Creek that you understand to be the Barnard home that you visited?

A. I think I could come very close to it.

Q. I show you a plat of township 6, south range 20 east, and ask you to look at it and point out the place where Coe D. Barnard resided if you can?

A. I cannot pick it out on that.

Q. What say?

A. I cannot pick it out on this; I could come within a mile or two of it there.

Q. Well, whereabouts is it?

A. Well, it is somewhere on the east side of this plat here, and not very far from the south side of it.

Q. Well, Mrs. Barnard pointed it out as in the northwest quarter of section 25, shown upon that plat, which you hold. Can you state whether or not from your knowledge of the situation that is correct or incorrect? A. Some part of section 25?

Q. Yes, some part of section 25 east.

A. I could not say—I am asking you?

Q. I don't know anything about it. That is what I understand one of the witnesses here testified to?

A. I could not say whether it was in section 25 or not; it is not very far from that.

Q. What is that?

A. It cannot be very far from that.

(Testimony of James Stewart.)

Mr. BENNETT.—I think we can agree on that; we will have no disagreement as to where the place is, if we have a chance to get a map and agree.

Mr. BRISTOL.—Can we agree on where the Barnard place is on the map?

Q. Can you state whether or not it was in township 6 south range 20 east, on Butte Creek?

A. Yes, sir, I am pretty sure it is there.

Q. What?

A. I am pretty sure it is there.

Q. And if Mrs. Barnard fixes it in section 25 in that township on Butte Creek, do you deem that to be correct or incorrect as the fact may be?

Mr. BENNETT.—That is objected to.

Question withdrawn.

Mr. BRISTOL.—I am willing to take Mrs. Barnard's testimony as to its being the northwest quarter of section 25, the old Connell place.

Q. How long have you known Mr. Barnard?

A. Sixteen years.

Q. And during that time where did he live?

A. He lived either in Fossil or down Butte Creek.

Q. Either in Fossil or down Butte Creek?

A. Yes, sir.

Q. I show you a paper and ask you to look at it and state whether you have ever seen it before?

(Testimony of James Stewart.)

A. Yes, sir.

Q. What is it?

A. It is Coe Barnard's final proof.

Q. For what? A. For his homestead.

Q. For what homestead?

A. The homestead he proved up on before me.

The foregoing was the whole of his direct-examination and cross-examination to where witness was asked the following question:

Q. What homestead do you know?

To which the defendant objected as not proper cross-examination, as incompetent and immaterial and irrelevant, whereupon the Court asked the district attorney, "What do you propose to show," and Mr. Bristol for the Government stated, "I propose to show matter affecting the truth and veracity of the defendant Coe Barnard, nothing more or nothing less.

The COURT.—Can you show this by a specific instance?

A. I propose to show by this witness that Coe D. Barnard, before this witness, as a United States Commissioner, swore to the fact that he had continuously resided on a homestead other than the place he did reside, and thereupon the Government asked that the ruling upon the question be postponed until after ad-

(Testimony of James Stewart.)

journment for lunch, and when the Court had reconvened, the Court overruled the objection, to which ruling of the Court the defendant by his counsel then and there in open court excepted and thereupon the witness testified:

A. The homestead described here (indicating the final proof which had been shown him).

Thereupon the following question was asked:

Q. What is the fact, Mr. Stewart, what is the fact as to whether or not you have heard or know whether Coe D. Barnard on or about the 23d day of June, 1905, before you as United States Commissioner gave any testimony under oath then in the matter before you.

Whereupon the defendant objected to that part of the question in which the witness is asked to state as to what he knows of his own knowledge, but the objection was overruled and the defendant excepted and his exception was allowed, and thereupon the final proof paper which had been shown to the witness was offered in evidence, and was in words and figures as follows:

To which the defendant objected as incompetent, immaterial, and not proper cross-examination, but the objection was overruled and the paper admitted in evidence.

(Testimony of James Stewart.)

To which ruling the defendant then and there excepted and his exception was allowed.

The said Coe D. Barnard was not a witness in the case.

And be it further remembered, that after the evidence was in and at the proper time under the rules of the Court, the defendant asked the Court to instruct the jury as follows:

"If the defendant thought that going upon the land and staying once in six months was a continuous residence within the meaning of the law, you should consider that fact in passing upon his good faith, and if you have a reasonable doubt as to what he believed upon the subject you should give him the benefit of that doubt."

But the Court refused to give said instruction in the language asked for, or at all, except as covered in the general charge as hereinafter set forth.

To which refusal and modification the defendant excepted and his exception was allowed:

Thereupon, the defendant during said trial and at the proper time required by the rules of the Court, requested the Court to instruct the jury as follows:

"A homestead claimant has a right to lease or let a part of his claim to other parties for cultivation and doing so before he proves up is no violation of the homestead law."

But the instruction was refused in the language requested and was not given except as given in the general charge, hereinafter set forth.

To which refusal and modification, the defendant excepted and his exception was allowed.

Thereupon, the defendant during said trial and at the proper time required by the rules of the Court, requested the Court to instruct the jury as follows:

"The cultivation by a tenant or agent in good faith, might be a sufficient cultivation within the meaning of the law."

But the instruction was refused in the language requested and was not given except as given in the general charge, hereinafter set forth.

To which refusal and modification, the defendant excepted and his exception was allowed.

Thereupon, the defendant during said trial and at the proper time required by the rules of the Court, requested the Court to instruct the jury as follows:

"An enclosure made by joining a fence to a bluff is a fencing within the meaning of the law."

But the instruction was refused in the language requested and was not given except as given in the general charge hereinafter set forth.

To which refusal and modification, the defendant excepted and his exception was allowed.

Thereupon, the defendant during said trial and at the proper time required by the rules of the Court, requested the Court to instruct the jury as follows:

"In this case I charge you that the indictment is insufficient to sustain a verdict of guilty and you should find the defendant not guilty."

But the Court refused to give said charge.

To which refusal the defendant excepted and his exception was allowed.

Thereupon, the defendant during said trial and at the proper time required by the rules of the Court, requested the Court to instruct the jury as follows:

"You should not permit any clamor or public opinion, real or imagined, to prevent you from giving the defendant a fair trial, and the benefit of all reasonable doubt."

But the Court refused to give said charge.

To which refusal the defendant excepted and his exception was allowed.

Thereupon, the defendant during said trial and at the proper time required by the rules of the Court, requested the Court to instruct the jury as follows:

"No mere carelessness or recklessness on the part of the defendant in giving his evidence in the Watson final proof will sustain the charge of perjury in this case, but it must be made to appear beyond a reasonable doubt that his statements were willfully and in-

tentionally false and that he did not believe them to be true."

But the Court refused to give said instruction in the language requested and it was not given at all except as covered by the general charge hereinafter set forth.

To which refusal and modification the defendant excepted and his exception was allowed.

Thereupon, the defendant during said trial and at the proper time required by the rules of the Court, requested the Court to instruct the jury as follows:

"You have no right to consider the homestead proof of Barnard, upon his own land as bearing in any way upon his honesty and integrity or truth and veracity, you can only consider it as bearing upon the credibility of the witness Stewart."

But the Court refused to give said instruction in the language requested, or at all, except as covered in the general charge hereinafter set forth.

To which refusal and modification the defendant excepted and his exception was allowed.

And thereafter, the defendant asked the Court to instruct the jury as follows:

"You cannot find the defendant guilty of perjury in the matter of the statement that there was about 2 acres in cultivation."

But the Court refused to give said instruction and to its refusal the defendant then and there excepted and his exception was allowed.

And thereafter, the defendant asked the Court to instruct the jury as follows:

"You cannot find the defendant guilty in this cause on account of any falsity, real or supposed, as to the statement in the proof that there was a house or fencing on the land."

But the Court refused to give said instruction and to its refusal the defendant then and there excepted and his exception was allowed.

Thereupon, the Court charged the jury as follows:

Charge of the Court to Jury.

Gentlemen, I will be as brief as I consistently can.

There are certain legal principles that are applicable in the trial of all criminal cases. It is incumbent upon a Court to say them before a jury, although I doubt not that your own experiences in courts of justice have kept you very well informed as to what most of these fundamental principles are.

We have entered upon the last stage of the trial of an important criminal case. I have observed that the close attention that you have paid to the evidence is prompted by a conscientious desire and a purpose to do your duty by arriving at a verdict after a fair, impartial and candid consideration of the testimony

as introduced by the Government against the defendant, and by the defendant in behalf of himself.

A great many men laugh or rail at jury trials, but there is no institution in the history of the Anglo-Saxon countries that has stood the tests so well of centuries of time as jury trial to determine the question of the guilt or innocence of a man charged for a crime. You come together, some of you perhaps for the first time in your lives sitting as jurors, taken from the walks of commercial life, perhaps taken from the factory, perhaps taken from the farm, perhaps some of you retired with no activities in business life, some of you tradesmen, some of you wealthier men, and you listen to both sides of a case; you hear the law which is is but the enunciation of the reason of centuries of the thought of learned men in applying reason and truth to the experiences of every day affairs, and you retire to your jury room and deliberate, and there the law in its wisdom says that all twelve of you must concur in any verdict rendered, and when you have considered the evidence and reached a conclusion, it is your duty to declare that conclusion without fear or favor and bring it into court in the form of a verdict.

You will approach the consideration of this case mindful of certain principles. First, there is the presumption of innocence, which is accorded to every defendant charged with crime under our system of

laws; he is presumed to be innocent until the Government has established his guilt by competent evidence beyond a reasonable doubt.

Learned men have defined a reasonable doubt. I would not attempt to place before you any original definition of it, but am content to give it to you as I have given it to juries many times before in the trial of important cases, by asking you to remember the language of Chief Justice Shaw of Massachusetts, who thus defined it to a jury in the great murder case of the Commonwealth vs. Webster many, many years ago.

A reasonable doubt, he said, is not such a doubt as any man may start by questioning for the sake of a doubt, nor a doubt suggested or surmised without foundation on the evidence or testimony; it is such a doubt only as in a fair, reasonable effort to reach a conclusion upon the evidence, using the mind in the same matter as in other matters of the highest importance, prevents the jury from coming to a conclusion in which their minds rest satisfied; if so using the mind and considering all the evidence produced it leads to a conclusion which satisfies the judgment and leaves upon the mind a settled conviction of the truth of the fact, it is the duty of the jury so to declare that fact by their verdict. It is possible always to question any conclusion derived from testimony, but such questioning is not what is a reasonable

doubt; it is that state of the case, which, after an entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

You will also remember, gentlemen, that the function of the jury is to judge of the credibility of witnesses; that is exclusively the function of the jury; the judge may express his opinion; I think it has even been held that he may go so far as to tell a jury that he doubts the truth of any witness who has testified, but that is merely his opinion. You, and you alone, are to judge of the credibility of the witnesses, uninfluenced by any opinion that anybody may have upon the question of the credibility of testimony.

Now credibility comprehends the truth or falsity of testimony. You see a witness come upon the stand, the presumption of law is that he is telling the truth; but that presumption may be overcome by his manner upon the witness stand or by evidence which affects his reputation for truth and veracity, or by proof that he has made contradictory statements at different times, or by other evidence which assails the credibility of his testimony. And there is another privilege that belongs to a jury. If a jury believe that any witness has willfully sworn falsely to any material matter, they are at liberty to disregard the

entire testimony of such witness except in so far as it may be corroborated by other credible evidence.

Now, let us move on and examine for a minute the precise charge against this defendant Barnard and the nature of that charge. The indictment is drawn under the perjury statute of the United States, which defines perjury in this way:

"Every person, who, having taken an oath before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes to any material matter which he does not believe to be true, is guilty of perjury."

The oath that this defendant is alleged to have taken was before the United States Commissioner, who was a witness here—Steward, his name was.

The law authorizes Steward as a United States Commissioner to take affidavits and proofs in respect to land entries and land proofs; so that, upon that question you will have no trouble as to the competency of authority of Steward to administer an oath in a land matter; he had that under the law.

It is also, I think, very clearly in evidence before you that this defendant did take an oath before the United States Commissioner. The final proof of

Watson, together with the proof of the defendant Barnard as a witness, which appears to be duly subscribed and sworn to before the Commissioner, is in evidence, and you will have no trouble, I take it, upon that point.

You will then advance to the essential question as to whether or not the defendant Barnard willfully, and contrary to the oath that he had taken, or took before the Commissioner, stated or subscribed and swore to, any material matter as alleged in the indictment against him, which he did not believe to be true.

Now, let us take the indictment and see what the particular matter referred to in it is.

It is generally charged that when the Commissioner Steward took the proof of Watson in support of his homestead entry for the south half of the northeast quarter, the southeast quarter of the northwest quarter and the northeast quarter of the southwest quarter of section 11, township 6, south, range 19, east, upon which Watson had made his filing at the Land Office at The Dalles on the 23d of June, 1904, came in person before Steward, the Commissioner, and testified; it is charged that it then and there became and was material that Steward, the Commissioner, should be and become informed from and by the testimony whether Watson had settled upon, and resided upon, and improved and cultivated the lands described as required by the homestead laws of the United States;

and if so, when such settlement and residence began and how long it continued, what was its character and whether it commenced in the year 1898 and continued for five years thereafter, and especially whether Watson had resided continuously on the said land for a period of five years since first establishing residence thereon, and for what period or periods Watson had been absent from the land since making settlement thereon, and for what purpose he was so absent and whether Watson had cultivated the land and how much thereof he had cultivated, and for how many seasons he had raised crops thereon, and what improvements were on the land and what was their value. It is charged that the defendant Barnard was sworn and made oath before the Commissioner, and to prevent the Commissioner or register and receiver of the land office at The Dalles from knowing the true facts and circumstances pertaining to the settlement and residence of Watson upon, and his cultivation and improvement of, the said lands so described in and by his testimony so subscribed, did willfully corruptly and falsely and contrary to his oath swear as to the material matters set forth, which he did not then believe to be true. The testimony which the indictment alleges the defendant Barnard gave and subscribed, was and is in the following words and figures. I would say gentlemen, that Miss Fleming did not have time to compare this with the indictment,

and if there be any little clerical omission I would be glad if you will call my attention to it. I am prepared to say that Miss Fleming is so very accurate that there probably is not, but still there might be.

"HOMESTEAD PROOF—TESTIMONY OF WITNESS.

Coe D. Barnard, being called as a witness in support of the homestead entry of Charles A. Watson for the south half of the northeast quarter, the southeast quarter of the northwest quarter, and northeast quarter of southwest quarter of section 11, township 6 south, R. 19 E., W. M. testified as follows:

Question 1. What is your name, age and postoffice address?

Answer: Coe D. Barnard, age 31 years, Fossil, Oregon.

Question 2: Are you well acquainted with the claimant in this case and the land embraced in his claim?

Answer: Yes.

Question 3: Is said tract within the limits of an incorporated town, or selected site of a city or town, or used in any way for trade or business?

Answer: No, sir.

Question 4: State specifically the character of this land, whether it is timber, prairie, grazing, farming, coal or mineral land?

Answer: No, sir; grazing land, rough and mountainous.

Question 5; When did claimant settle upon the homestead, and at what date did he establish actual residence thereon?

Answer: In the spring of 1898, established residence at the same time.

Question 6: Have claimant and family resided continuously on the homestead since first establishing residence thereon? If settler is unmarried, state the fact.

Answer: Yes, except as stated below, he is unmarried; I live about eight miles from settler's place. In riding for my stock I frequently ride past his place and stop at his house.

Question 7: For what period or periods has the settler been absent from the land since making settlement, and for what purpose, and if temporarily absent did claimant's family reside upon and cultivate the land during such absence?

Answer: He made a trip to the Willamette Valley in July, 1902, for the benefit of his health and returned in October, 1902.

Question 8: How much of the homestead has the settler cultivated, and for how many seasons did he raise crops thereon?

Answer: About two acres. He raised a crop on it every year since 1898. The rest of the land is too

steep, rough and rocky for cultivation. He pastures about 25 head of his horses on the place.

Question 9: What improvements are on the land and what is their value?

A. A lumber house 12 by 16, lumber roof, lumber floor, one room ceiled and papered, good spring water, all fenced with three wires; total value of improvements about $250; one door and one window.

Question 10: Are there any indications of coal, salines or minerals of any kind on the homestead; if so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.

Answer: No.

Question 11. Has the claimant mortgaged, sold or contracted to sell any portion of said homestead?

Answer: Not to my knowledge.

Question 12. Are you interested in this claim and do you think the settler has acted in entire good faith in perfecting his entry?

Answer: No (that is as to the interest in the claim). Yes (that is, as to the question whether he thinks the settler has acted in entire good faith in perfecting the entry).

Sign plainly with full Christian name.

COE D. BARNARD.

I hereby certify that the foregoing testimony was read to the witness before being subscribed, and was

sworn to before me this 23rd day of June, 1904, at my office in Wheeler county, Oregon.

JAMES S. STEWARD,

United States Commissioner for Oregon."

Remembering, gentlemen, that this is the matter set forth in the indictment.

The pleading then charges that in truth and in fact Watson, at the time Barnard so subscribed and swore to the truth of this testimony just stated, as he, Barnard, then and there well knew, had never settled or resided upon and improved or cultivated the land so described as required by the homestead laws of the United States, or in any manner whatever, and had not settled upon and established actual residence thereon in the year 1898 or at any other time, and had not resided continuously on the land, or any part thereof, since first establishing residence thereon, except when he made the trip to the Willamette Valley in July, 1902, for the benefit of his health, and had not returned to said land and re-established his actual residence thereon in October, 1902, or at any other time in said, or in any other year, and had not raised a crop on said land every year from 1898 to 1904, or during any of said years, and had not cultivated two acres of said land. And so the grand jury charge that the defendant Barnard, in this manner and form, in and by his testimony upon his oath, is charged with having willfully, unlawfully,

and contrary to his oath, stated and subscribed to material matters which he then did not believe to be true, and thereby did commit wilful and corrupt perjury.

Bearing in mind the definition of perjury as I gave it to you from the statute of the United States, it is not necessary that the Government prove to you not only what the defendant swore to was in fact untrue, but that he did not believe it to be true. This involves two matters: first, that Watson never had settled or resided upon, or improved or cultivated the land described in his homestead entry as required by law, and had not settled upon and established actual residence thereon in the year 1898, or at any other time, and had not resided continuously on the land since first establishing residence thereon, and had not raised a crop on the land every year from 1898 to 1904, or during any of said years, and had not cultivated it. That is the first proposition. The second is, it must be established that Barnard knew, or believed, when he gave his testimony to the final proof of Watson, that Watson had not settled or resided upon, or improved the land as required by the homestead laws of the United States, or in any manner, and had not settled upon or established actual residence thereon in the year 1898, or at any other time; and had not resided continuously on the land described, or any part thereof, as required by law since

first establishing residence thereon except when he made a trip to the Willamette Valley in July, 1902, for the benefit of his health or otherwise or at all; and had not returned to the land and re-established his actual residence there in October, 1902, or at any other time in said year, or in any other year; and had not raised a crop on said land every year from 1898 to 1904, or during any of said years, and had not cultivated two acres of said land.

There necessarily is involved, gentlemen, in the consideration of these questions that I have just stated to you were essentially involved, a consideration of the requirements of the homestead law of the United States.

Watson claimed under the homestead law; the defendant Barnard was one of his witnesses to his final proof that he had complied with the homestead law. Now it is hardly necessary to enter at great length upon the provisions of the homestead laws of the United States; those of us who have lived in the west for many years, I am sure, that it was designed by the Congress of the United States in the passage of that law that men might make homes on the public domain, that the unsettled lands of the United States might be settled upon, cultivated, resided upon, and might become the homes of settlers who would take them up in good faith.

By its provision every person who is the head of a family or over the age of 21 and a citizen of the United States, or who has filed his declaration of intention to become such, shall be entitled to enter one quarter section or less, of unappropriated public lands to be located in a body in conformity to the legal subdivisions of the public lands.

Any person applying to enter land under the homestead section shall first make and subscribe before the proper officer and file in the proper land office an affidavit that he is the head of a family, or over the age of 21 years, and that such application is honestly and in good faith made for the purposes of actual settlement and cultivation, and not for the benefit of any other person or persons or corporation, and that he will faithfully and honestly endeavor to comply with the requirements of law as to settlement, residence and cultivation necessary to acquire title to the land applied for; that he is not acting as agent for any person, corporation or syndicate, in making such entry, nor in collusion with any person, corporation or syndicate to give them the benefit of lands entered, or any part thereof, or the timber thereon; that he does not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for himself; and that he has not, directly or indirectly, made, and will not make, any agreement or contract in any way or manner, with any person or persons,

corporation or syndicate whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself, and upon filing such affidavit with the register or receiver upon payment of the fees, he shall thereupon be permitted to enter the amount of lands specified.

It is generally provided that no certificate shall be given or patent issued until the expiration of five years from the date of the entry provided for, and if at the expiration of said time or at any time within two years thereafter the person making such entry proves, by two credible witnesses, that he has resided upon and cultivated the land for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as specially provided, and that he will bear true allegiance to the Government of the United States, then and in such cases he will be entitled to patent.

The law of the commutation of a homestead is not material to this case. There is a law that permits a man who avails himself of the homestead law, to pay the minimum price for the quantity of land entered at any time after the expiration of fourteen calendar months at any time from the date of entry and obtain patent upon making proof of settlement, and of residence and of cultivation for such period of fourteen

months. It is not contended in this case that there was any commutation at all; it was a homestead entry where the proof was made after the expiration of five years.

Now, to establish a residence as required by the homestead law there must be combination of act and intent; the act of occupying and living upon the claim, and the intention of making the same a home to the exclusion of a home elsewhere. Inhabitancy must exist in good faith.

Now, you observe that I use the word intent. Intent is a question of fact to be arrived at by the jury in analyizing testimony, drawing inferences and deductions from testimony before them, and such external circumstances as may be capable of proof.

Good faith means nothing more nor less than honesty. As common sense men when you speak of bad faith you speak of the opposite of good faith. I take it that a sufficient definition of good faith is honesty, in respect to the public land laws; and whether or not there was good faith in this case, what the intention was—those are questions for you.

It is not a compliance with a homestead law for a man to file on a tract of land with no intention of making it his home, with no purpose of living there, with no intention of cultivating any part of it, and acquiring it for a place to reside in. Occasional visits made for a few hours or for a day or two every

six months to a claim taken up as I have just stated, where the entry is not made in good faith but solely for the purpose of attempting to comply technically with the law, do not constitute a compliance with the statute. On the other hand, if a man is really in good faith and means to establish a home for himself, and in good faith he settles upon the land and cultivates it and fixes his home there, the law will sustain him in his application and proof, even though he be absent for not more than six months from his home; such absence, however, being always with intent in good faith to return to his homestead, and being reasonably necessary to enable him to maintain himself and his family, if he has one, or he would be excused if temporarily absent on account of sickness, if the sickness was of a nature which reasonably required his absence, or on account of unavoidable casualty, or necessity occurring after he has established his home upon the land.

Now, gentlemen, I think I have touched upon the more salient features of the law that bear upon this case. I think it would simplify your labors to first take up the question of Watson's relation to the land. Was he a homesteader in good faith, and under the law? Did he honestly comply with the law as I have read its requirements to you and tried to define them? And second, did this defendant wilfully swear falsely as to the residence, cultivation and im-

provement of the place by Watson as alleged in the indictment, believing that his testimony as a witness in respect to the matters set forth in the indictment was true.

If you find these two propositions in the affirmative, that Watson was not a homesteader in good faith and did not reside upon and cultivate the land as required by law, and that this defendant willfully swore falsely in respect to the residence and cultivation and improvement of the place by Watson, believing that what he swore to was untrue, if you are satisfied with these two propositions beyond a reasonable doubt you should convict; if you are not you should acquit.

You have the original proof if you desire them. Should you want any of the exhibits in the case you are at liberty to send for them. The practice is not to deliver exhibits to a jury, unless in their deliberations they desire to have them.

You have heard the testimony, you have heard the questions and answers set forth in the indictment and as read in these proofs; you should consider them; and you also have a right to consider the question of whether or not defendant did or did not honestly believe that going upon the land once very six months was a compliance with the law. You may consider that as bearing upon the question of good faith and intent, but also consider the specific answers made to

the questions I have read, not only as to the general question of good faith but as to the particular acts that he testifies to concerning Watson's settlement and cultivation.

I will remind you that throughout the trial certain evidence was offered and permitted to be introduced under certain limitations, which the defendant requests be called to your attention, and which I do, reminding you.

You will remember that there was some evidence offered tending to show that this defendant had been connected with proofs in certain other cases where the evidence of the Government was offered for the purpose of showing there was bad faith in such other entries. The relevancy of that testimony, gentlemen, is as bearing upon the question of whether or not there was a scheme or design or system on the defendant's part in connection with the acquisition of this particular land involved in this case—not the acquisition; that is not a correct term; as to whether there was a system or design in knowing of how many proofs were being made where there may have been false swearing in making such proofs.

It is fundamental that there can be no conviction in a criminal case, except for the particular crime charged against the defendant on trial.

You could not convict the defendant, no matter how culpable you might believe him in connection

with any other entry than this Watson described in the indictment; but I repeat such evidence was offered and admitted and must be limited in your consideration to its relevancy as to the design, or intent, or knowledge, or system that the defendant may have had in doing the particular act charged against him.

You will remember also that to-day the United States Commissioner testified as to the reputation of the defendant for truth and veracity in the community in which he lived. Upon cross-examination there was a proof which had been made by the defendant upon certain land other than that upon which it is contended he made his home for a long time. The applicability of this is limited to the question of the credibility of the witness Steward in his testimony which he gave as to the reputation of the defendant, that is it is offered for the purpose of affecting the credibility of the statements made by the witness Steward.

I think, gentlemen, that that covers the main features of the law applicable to this case. If I have omitted anything, why try to think of it; for with the strain that has been upon us all for two days it is not to be wondered at that something may have been omitted.

Do you think of anything, Mr. Bristol, that you desire for the Court to suggest to the jury?

Mr. BRISTOL.—The Government has no suggestion to offer, may it please the Court.

Mr. BENNETT.—If your Honor please, I will ask an exception to the refusal of such instruction as we ask for and that were not given, and to each of them;

and I think I will ask an exception to that part of your Honor's charge in which you said the jury might consider the specific answers, and which your Honor had read over to them, as being charges upon which they would not have any right to pass under the indictment.

The COURT.—Judge, I tried to limit that. Consider them as bearing upon the allegations of the land indictment. I tried to limit that several times, and of course the jury will understand that consideration is addressed to the specific matters charged in the indictment which I have recapitulated.

Mr. BENNETT.—My point was that our contention was it ought to have been limited to the matters which are alleged in the indictment; many of those answers, and there are two or three that I call your Honor's especial attention to, are not alleged to have been false.

We also desire to except to that part of your Honor's instructions in relation to the admission of the testimony as to the other final proofs being ad-

missible for the purpose of showing the design, the system, so on and so forth, as not the law of the case and misleading to the jury.

And also that part of the instructions in which your Honor instructed the jury that such testimony was admissible upon the question of knowledge.

The COURT.—I didn't hear that last; read me that, Miss Fleming.

The same was read by Miss Fleming.

The COURT.—I think I tried to make myself clear in the relevancy of that offer; but in your exception you go further than my charge, Judge. I did not tell the jury that it proved anything; I said it was offered for the purpose; whether it does or not is a question for them in these matters. Now, gentlemen, here is a blank verdict which, whatever your finding is, you will, by your foreman, sign and bring into court.

Whereupon, the jury retired to consider of their verdict, etc.

Thereupon at the close of said charge and before the jury had retired, and in the presence of the jury, the defendant excepted to that portion of the charge which was as follows:

Defendant's Exceptions to Charge of the Court to Jury.

"* * * but also consider the specific answers made to the questions I have read, not only as to the general question of good faith, but as to the particular acts that he testifies to concerning Watson's settlement and cultivation."

Upon the ground that said instruction was not limited to the answer alleged to have been false in the indictment, and the exception was allowed.

And the defendant then and there excepted to that portion of the charge which was as follows:

"* * * but I repeat such evidence was offered and admitted and must be limited in your consideration to its relevancy as to the design, or intent, or knowledge, or system, that the defendant may have had in doing the particular act charged against him."

Upon the ground that it was misleading and not the law of the case and the defendant also excepted to that part of the instruction in which the Court charged the jury that such testimony was admissible on the question of knowledge, and said exceptions were allowed.

In the Circuit Court of the United States, in and for the District of Oregon, Ninth Judicial Circuit.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

COE D. BARNARD,

Defendant.

Amendment to Proposed Bill of Exceptions.

Be it remembered that the above-entitled cause came on for trial upon the indictment upon the 8th day of August, 1906, before the Honorable William H. Hunt, United States District Judge, and a jury, duly impaneled, and during the trial of said cause and as a part of the Government's direct case, evidence was introduced tending to show that the defendant lived ten or twelve miles from the Watson place, along up Butte Creek, toward Fossil; that one of the witnesses, Stephen Matteer, first saw Watson in the summer of 1898, in June or the latter part of May, when he was leading a span of horses up the creek, and that there was nothing at that time stated by Watson as to a claim that he had in the neighborhood; that the witness had not seen him at all from that time until he had seen him in the courtroom; that this place called the Watson place adjoined the witness' east line; that there was a cabin without floor and without furniture and without stovepipe,

on the Watson place, but there was nothing around the cabin by way of improvements or cultivation, or anything that the witness had ever seen, and that the witness had never seen anybody residing there in the years 1898, 1899 and 1900; that witness had found his cow several times in the cabin; that she went in through the hole that was made for a door; that the witness never saw any evidence of habitation or settlement or cultivation about the place up to March, 1901; that he did not see the cabin in 1901 after June; that down the creek from the cabin there was a garden patch of about three-quarters of an acre, upon which garden was raised in 1901; that when he saw the cabin in June, 1901, its condition was no different than when he saw it the first time; it had no door, nor window, nor chimney in it, and that there was no evidence of any habitation in or about the cabin, that it was the same then as it was in 1898, as far as witness could see; that the garden which was there in June, 1901, was the same patch that witness had been working in previous years.

Further evidence was then introduced, considering the allegations of the indictment as to the homestead entry of Watson, supplemented with the entry papers which had been filed therefor and on which the defendant, Coe D. Barnard, appeared as a witness, and that he was the same person who appeared as a in the indictment and subscribed it under oath.

Further evidence was then introduced by the witness, Maggie Matteer, who corroborated the first witness, Stephen Matteer, that they had lived on the place next Watson's on Butte Creek for five years, or thereabouts, a good part of the time, and that on different occasions she had been down to the Watson cabin to get her cow and found her cow by looking into the cabin and finding her there; that the cabin was like a shed, roofed just one way, and there was no window nor door, with the exception of a half end which was left open for a door; there was absolutely no sign of anyone living there at all; that these conditions were as she observed them from the year 1897; that she saw C. B. Zachary working on the cabin when it was originally put up; he was sawing boards and nailing them up and putting up the cabin; that there was no garden on the place except the small garden that the Matteers raised; that there were no other signs of residence or cultivation in or about the claim that she ever saw, with the exception of the cabin as described; that she had heard of Mr. Watson filing on the place at the time he had filed and it was after that that she saw the cabin built; and to like effect so testified Edward Matteer, a son of Stephen and Maggie Matteer before mentioned; and that in October, 1901, he saw no signs whatever of anyone ever having lived upon the Watson place;

and to like effect so testified Elmer Matteer, a son of Stephen and Maggie Matteer before mentioned, and gave evidence upon the same subjects and to like effect as Stephen and Maggie Matteer; and further, that several months after the time that he had scared Watson's horse at his father's place he had been up to and seen the Watson cabin, and there was no change in its condition, and it was after that that he found the cow there.

Thereupon further evidence was introduced as a part of the Government's direct case, by one WILLIAM SHEPARD, who was called as a witness and testified that his name was William Shepard; that he lived at Mountaindale, Washington County, in Oregon, about west of Portland, twenty-three miles by the wagon road from Hillsboro; that he had lived there from 1903; that he went there in the spring of 1902; that he had met Charles A. Watson, and that he had met Coe D. Barnard; that Barnard was in the courtroom; that he left Wheeler County, the Fossil country, on Friday, the 19th day of June, 1902, and went to Mountaindale; that he saw Charles A. Watson around Moutaindale in 1902, hauling lumber for William Hollenbeck from a sawmill up on Dairy Creek; that he was there about two weeks hauling lumber in June or July, some time after the third of July; that after 1902 he saw him again in Portland; that before that, in 1901, Watson was running

(Testimony of William Shepard.)

a saloon at Greenville; that Greenville is between seven and eight miles from Mountaindale; that was in the months of June and July, 1901; that Watson was running the saloon himself; that witness landed there about the 21st of June with some horses and left about the 15th of July; that he had talked with Watson at that time; whereupon the following questions were asked the witness and the following answers were given:

Q. Was there anything said by him with reference to a claim or anything of the kind he had up Fossil way?

A. Yes, sir; he said he had a claim up there.

Q. And did he state at that time, or in connection with that same matter while you were conversing, the reason why he didn't go back to it?

A. Well, he asked me how it would do for him to go back. I told him, I says, "If you are making a good living here and trying to be honest you had better stay where you are," something to that effect.

Q. What was the rest of the conversation, if any?

A. Well, it was about the horses that he fetched down. I asked him the price that he got for them, and so on.

Q. The horses that he had down where?

A. That he fetched down in 1899.

(Testimony of William Shepard.)

Q. What horses were they?

A. They were horses that he got from Barnard.

Q. This same defendant here? A. Yes, sir.

Q. Just tell the jury about that please.

A. About the horses?

Q. Yes; just what you know, not what anybody told you, but just tell us what the facts are.

A. Well, he was working for Mr. Barnard and he got those horses and fetched them down here to sell. There was seventeen head of them that passed through the gate going down the hill to my brother's ranch.

Q. When was that?

A. That was in July, about the 17th, 1899.

Q. Now, you say that these horses were where at that time—at Barnard's?

A. At Barnard's, yes, sir. I counted them as they went by.

Q. How do you know they were Barnard's horses?

A. Because I had seen him leading them around there, breaking them and riding them on the range in the spring of the year, gathering up horses.

Q. Now, where were those horses taken to, do you know?

(Testimony of William Shepard.)

A. Why he fetched them to Greenville; at least, that is what he said. He might have sold them along the road, or traded them off, or something.

Q. Did you converse with Watson at about that time? A. Yes, sir.

Q. What was the fact about his saying anything about his ranch?

A. Well, he said he wanted to go back and prove up.

Q. Did he say why?

A. Well, he said the parties wanted him to come back.

Q. Who did he say wanted him to come back?

A. Well, he had reference to Mr. Hendricks—the company.

Q. Did he give you any reason why he didn't go back?

A. Well, he didn't think that people wanted him there, I guess.

Q. Did he tell you why?

A. No, he didn't tell me exactly why.

Q. Did he give you any reason why?

A. Well, all the reason was that there was some horses run off that spring, and he says he was hired to do it, and he didn't suppose the settlers wanted him to come back.

(Testimony of William Shepard.)

Mr. BENNETT.—We move that all that conversation be stricken out as incompetent and hearsay against this defendant.

COURT.—That conversation is competent. That conversation was all with Watson? A. Yes, sir.

Mr. BRISTOL.—Relative to the claim, if your Honor pleases.

COURT.—Its relevancy may be as to the bearing upon the question of residence upon the claim by Watson. That is its only relevancy. With that limitation upon it, I think it is competent.

Mr. BRISTOL.—That is the only purpose, may it please your Honor, for which it is offered.

COURT.—It is, of course, necessary that the Government establish that Watson did not live on that claim as required by the laws of the United States.

Defendant allowed an exception.

The foregoing was all the testimony of the witness Shepard, all the objections taken thereto, all the rulings of the Court thereon and all the exceptions taken thereto. But further, upon the recross-examination of the witness, and after counsel for the defendant had examined the said Shepard at some length, the following proceedings in respect thereof were had, and none others, to wit:

(Testimony of William Shepard.)

Mr. BENNETT.—Q. At the time you claim to have had this conversation with Watson in Greenville was Coe Barnard present?

A. No, sir, he was not. This particular conversation was at Greenville.

Q. You don't claim that Coe Barnard was present at all? A. No, sir, he was not.

Mr. BENNETT.—Now, your Honor, we move to strike out the answer to this question: "Was there anything said by him with reference to a claim he had up Fossil way?" and the answer: "Yes, sir, he had a claim up there." We desire to move the Court to strike that answer out, upon the ground that it is incompetent and immaterial, not binding in any way upon this defendant; and we desire to ask the Court to strike out the answer to the next succeeding question, in which the witness says: "Well, he asked me how it would be for him to go back there, and I said to him: 'If you are making a good living here, trying to be honest, you better stay where you are,' or something to that effect," and upon the ground that it is incompetent, immaterial, hearsay and prejudicial to the defendant, and not in any way binding upon him. And the answer to the question which was asked him some little time afterward, the question being: "What was the fact about his saying anything then about the ranch?" We move to strike

(Testimony of William Shepard.)

out the answer, which was, "He said he wanted to go back and prove up," as being immaterial and incompetent and hearsay, and not in the presence of the defendant, and not in any way binding upon him, and not competent evidence against this defendant as to any fact in the case. And the answer to the succeeding question: "Did he say why?" "A. He said parties wanted him to go back." We desire to move to strike that out as being incompetent and hearsay, not made in the presence of the defendant, in no way binding upon him, not being competent evidence as against this defendant of any fact in the case, and as tending to be prejudicial to the defendant in this case. And the answer to the succeeding question: "For whom did he say he wanted him to go back?" A. He had reference to Mr. Hendricks." We move to strike that out as being incompetent and immaterial, calling for a conclusion of the witness, and not made in the presence of Mr. Barnard, the defendant, and not in any way binding upon him, and tending to prejudice the defendant in the case by the alleged hearsay statements of some other party. And the answer to the next question, the question being: "And did he give you any reason why he did not go back?" "A. He didn't think the people wanted him there, I guess," being the answer. We move to strike that out as tending to prejudice the de-

(Testimony of William Shepard.)

fendant in this case, incompetent, and not made in the presence of this defendant, not in any way binding upon him, hearsay. And we move to strike out the answer to the next question, the question being: "Did he tell you why?" "A. No, he didn't tell me exactly why," upon the ground that it is incompetent, and not in any way binding upon the defendant, not made in his presence, hearsay. And the answer to the next succeeding question, the question being: "Did he give you any reason why?" "A. Well, all the reason was that there was some horses run off that spring, and he said he was hired to do it, and he didn't suppose the settlers wanted him to go back." We move to strike that out as being incompetent, hearsay, and tending to prejudice the defendant by the statements of another party, for which he is in no way responsible, and not in any way binding upon him. I make this motion at this time. It seems to me if this is to be stricken out at all, it ought to be stricken out now, because the longer anything of that kind stands before the jury the more unfair it becomes, if it is not proper or competent; and therefore we move to strike out each of these statements upon the grounds stated.

COURT.—I have looked into that, Judge. If you have looked into any authorities on that question, I think you will find that the authorities hold that that

(Testimony of William Shepard.)

is admissible testimony under the limitation I stated yesterday.

Mr. BENNETT.—The motion, then, is overruled, as I understand?

COURT.—I have overruled your motion.

Mr. BENNETT.—We take an exception as to each specification of the motion.

Mr. BRISTOL.—The Government renews its limitation as to the purpose for which the testimony was offered. It is solely as to the matter of residence, your Honor.

Witness excused.

And thereupon E. A. PUTNAM was called as a witness upon the part of the government, as a part of its direct case, who testified that his name was E. A. Putnam; that he now lived in Douglas County; that he had formerly lived in Wheeler County, twenty-six or twenty-seven years; that he knew both Mr. Barnard, the defendant, and Charles A. Watson; that he had seen Charles A. Watson in Portland in 1903 at the Merchants' Hotel, about the 28th of April in that year; that there were no other persons present that he was acquainted with, and that they were then inside the Merchants' Hotel; that he had a conversation at that time and place with Charles A.

(Testimony of E. A. Putnam.)

Watson; whereupon the witness was asked the following questions:

Q. State whether or not there was anything in that conversation that showed, or tended to show, where Watson had been about that time or immediately preceding it.

Mr. BENNETT.—We object to that, your Honor, as being incompetent, and not in any way binding upon the defendant in this case, and as hearsay, not the best evidence.

COURT.—It goes in subject to the same ruling. You might make your objection general, Judge. I understand it applies to all conversation had between Watson and any witness, not in the presence of the defendant, wherein Watson referred to his residence or acts connected with his homestead entry.

Mr. BENNETT.—And it may be understood, your Honor, that as these questions are put in, to each of them we interpose the same objection.

COURT.—I so understand. The testimony is admitted solely as bearing upon the question whether or not as a fact Watson did state the truth in respect to the answers that he made in making his final proof.

Q. Just answer the question whether there was anything in that conversation that showed or tended

(Testimony of E. A. Putnam.)

to show where Watson had been or what he had been doing.

A. He had— Yes, we had a conversation.

Q. What did he say?

A. He said he had his foot cut at the time, he had been down working on the Columbia River, down about St. Helens somewhere, and said he had come up, and he was going out home, out to his place, out to where his folks lived.

Q. Did he say where that was?

A. Yes, sir, out towards Forest Grove, out in Washington County.

Q. What was the logging camp you said?

A. It was somewheres, I think, down about St. Helens, somewheres in there, the place I think he said.

In the suggested form of the bill of exceptions, the following question "Whereabouts?" given at the top of the page in reference to the evidence adduced from the witness Morgan, the United States desires the following added to the proposed bill of exceptions in order that it may conform to the record:

Q. Whereabouts?

Objected to as immaterial and incompetent.

COURT.—What is the purpose?

Mr. BRISTOL.—The purpose of this, if your Honor pleases, is to show—and the government pro-

poses to follow it with proof offered for the purpose of showing—a similar act on the part of the defendant, Coe Barnard. We offer to prove by this witness that this witness took a homestead and made proof and that Coe D. Barnard was his witness, and that the witness— (Here counsel was interrupted by)

Mr. BENNETT.—I think if you are going to make a statement of this kind you should make it in writing.

COURT.—Go ahead. It is perfectly proper.

To which defendant excepted.

Mr. BRISTOL.—And that at this particular time when this witness proved up, the defendant, Coe D. Barnard, was one of his witnesses and swore to his proof, and we will follow that by showing that at that time this witness did not reside, and never had resided, on that claim—as a similar act.

COURT.—Now make your objection. It is competent testimony.

Mr. BENNETT.—We object to it as immaterial, incompetent, tending to prejudice the defendant, and in no way bearing upon any issue in this case.

Objection overruled. Exception allowed.

COURT.—It is competent, provided it is anywheres near the time. If years elapsed, why it would not be. What time did he make his proof?

Mr. BRISTOL.—June 23, 1904.

COURT.—It will be admitted. You may have your exception.

Mr. BENNETT.—Take an exception, your Honor, and let it go to all this line of proof.

The place in the proposed bill of exceptions where the foregoing matter should be inserted is following the question "Whereabouts?" as above given, and just preceding the question "What is the fact, Mr. Morgan, as to who your witnesses were at the time you made this purported proof?"

On page 9 of the proposed bill of exceptions the United States desires added thereto the following, commencing with the word "Q. How did you come to take it for it?" the following, to wit:

Mr. BENNETT.—Same objection and the further objection that it now appears that the defendant was not in any way connected with the matter so far as that part of it is concerned, at least.

COURT.—Does it appear at all that this defendant was connected with that company?

Mr. BENNETT.—Not in the slightest, your Honor.

Mr. BRISTOL.—Why, in this particular case, your Honor, thus made and offered, there is no substantive evidence that the Butte Creek Land, Livestock

and Lumber Company is represented by the defendant Barnard, nor do I recollect any testimony that shows or tends to show who the officers of that company were in this particular case, but the purpose of the interrogation of the witness is to elicit, in connection with the offer heretofore made, the actual facts with reference to the connection of the defendant, if there was any connection at all. We expect to show that there was a connection and prove it.

Mr. BENNETT.—I think that Mr. Bristol must know that the defendant was not a stockholder in the company, or an officer in the company, or interested in the company in any way.

COURT.—The testimony is undoubtedly competent in my view of it, irrespective of that, provided this defendant was a witness; in other words, if the government can show system it is not relevant who the beneficiaries of that system may have been. That is the point. It would be competent undoubtedly to show who those beneficiaries were, provided the defendant was one of them, or he was their agent, but I do not remember whether there was testimony to show that he was acting on behalf of the company in any way. The testimony I think is competent bearing upon the question of system.

Exception allowed.

A. Well, Mr. Zachary asked me if I would take it up. That is how I come to take it.

Mr. BENNETT.—We move to strike out the answer of the witness and the question as incompetent and immaterial.

COURT.—I do not yet see how we can attribute to this defendant anything by the fact just elicited that Zachary told him to take that place up. It is a remote process of reasoning, it seems to me, that justifies that inference. Now, that this witness took this up without living upon it, without residing upon it and for the purpose of this hypothesis, not in good faith, and that this defendant was his witness and might have been familiar with the situation is perfectly competent, but I do not see how you can get the Zachary part into it unless you can connect Zachary and this defendant. I do not believe you have sufficiently brought in this Zachary matter in connection with the defendant.

Mr. BRISTOL.—Then the Government asks, your Honor, that the entire matter relating to the proposed agreement with the livestock company and the antecedent relations with Zachary, as disclosed by this witness, be expunged from the record, because I have no intention to get in evidence that is deemed by the Court to be foreign to the actual transaction.

COURT.—Let that go out, then. It is the purpose of this amendment to have it all inserted prior to the words on page 9 of the proposed bill, "There was no testimony offered," etc.

Redirect Examination—MORGAN.

Q. Can you tell us how it was that Mr. Barnard came to be your witness?

A. I never said anything to him about being a witness.

Q. Well, that is not my question. I asked you if you can tell us how it was he came to be your witness.

A. Well, somebody must have asked him to be a witness. It wasn't me. I don't know who it was. He was there—he was a witness.

Recross-examination.

Q. Did you advertise who your witnesses were going to be?

A. It was advertised, yes.

Q. How long before?

A. I don't know how long—six weeks, I guess.

Q. Was Mr. Barnard advertised as one of the witnesses?

A. Well, I didn't look at the paper. I guess he was there, though, if it was on the paper; that is all I know about it.

(Testimony of Morgan.)

Redirect Examination.

Q. Judge Bennett asked you whether you advertised the claim, and your answer was it was advertised. Now, then, did you advertise it?

A. No.

Q. Who did?

A. I don't know who put it in the paper. All I know is that it was in the paper. The Butte Creek Company must have advertised it; it wasn't me.

Recross-examination.

Q. You saw it in the paper? A. Yes, sir.

Q. Saw it running right along in the paper for the necessary time?

A. Well, I didn't watch it all the time, no.

Q. And at the time fixed in the paper, you went up there and proved up? A. Yes, sir.

Q. In accordance with that notice?

A. Yes, sir.

Q. And you say you did that because you wanted to get rid of the place? A. Yes, sir.

Redirect Examination.

Q. Well, why did you want to get rid of the place?

A. Well, I didn't want to stay in that part of the country any more. I intended going to California,

(Testimony of Morgan.)

and I wanted to get it squared up before I went away from there.

Q. Get what squared up?

A. That homestead claim.

Q. What was there to square up about it?

A. Well, there was the deal with the company. I had taken the claim for the company, and I wanted to get a deed for it, and get the money that was coming to me, and square up the deal.

Recross-examination.

Q. You were after your money from the company?

A. Well, when a man has got anything coming, why he generally wants it.

Q. What say?

A. If you have got anything coming, you generally want it.

Q. That was the reason why you were swearing to all these falsehoods, because you wanted that money, eh?

A. Well, not in particular, no.

Q. Oh, you weren't lying for the money, then?

A. No, I was lying because the company wanted the land.

Q. You were not lying to get the money?

A. Well, I would take the money, yes.

Q. That wasn't what you was lying for?

(Testimony of Morgan.)

A. Well, I was lying for accommodation, I guess.

Q. Yes, you was lying for accommodation?

A. Yes.

Q. It wasn't the money that you was going to get out of it?

A. Well, the money was connected with it, too.

Q. Which was the main object? Do you claim that the main object was the accommodation?

A. Well, it didn't make much difference to me. I didn't care anything about it; didn't care whether I proved up on it or not.

Q. You didn't care anything about the money you were going to get?

A. Well, I didn't have to have the money; I didn't need it in particular.

Q. No? But you were willing to lie for it, when you didn't need it?

Redirect Examination.

Q. Talking about this lying business, now. Just tell this jury the fact whether or not what lying you did do was done at the request, procurement, and solicitation of somebody else, for whom you were being used to take up that claim.

Mr. BENNETT.—We object to that as self-serving and leading, and putting the words in the wit-

(Testimony of Morgan.)

ness' mouth, and as being entirely incompetent against this defendant.

Objection overruled.

A. Well, I wouldn't have done any lying if I hadn't been asked to have done it.

Recross-examination.

Q. You didn't do it, then, because you were anxious to get the money out of it?

A. No, sir.

Q. That didn't have anything to do with it at all?

A. No; I could have got along without the money very easily.

Q. You were willing to swear to a falsehood to accommodate somebody that wasn't anything to you at all, you claim?

A. It had been done for the last twenty years; everybody else had done it, and I though I might as well lie a little bit as the rest of them.

Q. For accommodation or for the money?

A. Well, I answered that once.

COURT.—He has covered all that two or three times, Judge.

Witness excused.

JOHN MORGAN, recalled for further cross-examination.

(Questions by Mr. BENNETT.)

Mr. Morgan, was there a house on this claim of yours? A. Yes, sir.

Q. Did you sleep in that house when you was down there? A. On my claim?

Q. Yes. A. Yes, sir.

Q. You say you didn't the night you and your wife stayed there? You say you stayed there one night? A. I didn't stay there one night.

Q. You didn't? A. No.

Q. Was there furniture in the house?

A. There was furniture in the house where we stayed, yes.

Q. Well, was there furniture in the house on your place?

A. I didn't see any furniture there. There was a bedstead there.

Q. Table? A. Yes, sir.

Q. Stools?

A. There might have been a stool; I don't know.

Q. A stove? A. Yes, sir.

Q. Nor, after you proved up, you relinquished your claim, and sold your house and stove, and all the improvements on it, and the fencing to Mr. Kelsay, didn't you?

(Testimony of John Morgan.)

A. No, sir, I didn't sell it to Mr. Kelsay at all.

Q. Did you let Mr. Kelsay have it?

A. No, sir.

Q. Did Mr. Kelsay pay you any money for it?

A. No, sir.

Q. You claim he didn't?

A. Why, he didn't no. It wasn't mine; I wasn't going to sell it to Kelsay.

Q. You didn't sell those things to Kelsay at all?

A. Why, of course, I didn't.

Q. Nor to anybody? A. No.

Q. You swear positively to that? A. Why, yes.

Q. And you never got any money from him for them? A. No, sir.

Q. Did you get any money from him at all?

A. No, sir.

Q. You claim you didn't get any money from Kelsay for anything?

A. I didn't get any money from Kelsay at all.

Q. For anything at all? A. No.

Q. And Kelsay don't owe you any money for anything at all?

A. No, sir. I didn't sell Kelsay anything.

Q. Nor anybody anything in connection with that place?

A. I didn't sell anything on the place at all.

(Testimony of John Morgan.)

Q. Well, did you sell anybody anything in connection with that place at all? A. No; no.

Q. Did you sell anybody your right to the place?

A. I didn't have no right to the place.

Q. Well, did you sell anybody your claim on the place?

A. What kind of a claim do you mean?

Q. Well, any kind of a claim.

A. I didn't have no claim on the place.

Q. And you didn't sell anybody any claim on the place? A. No, sir; I had no claim to sell.

Q. You didn't sell anybody any claim to the place, or any claim about the place, in any way, shape or manner? A. I didn't sell no claim, no.

Q. Well, did you have any deal with anybody about that place after you proved up?

A. No, not after I proved up. I didn't prove up. I didn't get a deed to the place. I relinquished the place.

Q. After you proved up, did you have any deal with anybody about that place? A. No.

Q. After you made your final proof?

A. No. The deal was already made.

Q. You never made any deal with anybody after that? A. Not with Kelsay, no, or anybody.

(Testimony of John Morgan.)

Q. You went and drew down the money that you had put up for the place? Do you deny that, too?

A. Yes.

Mr. BRISTOL.—I submit that the witness has answered that two or three times in the other examination, what he did with it.

Q. Didn't you go and draw down the money that had been paid for that land to the land office after you had proved up? A. Yes, sir.

Q. You admit that, do you? A. Yes, sir.

Q. And have got the money yet? A. Yes, sir.

Q. Now, did you write that letter?

A. Yes, sir.

Mr. BENNETT.—I ask that that be marked for identification.

Marked, "Identified by John Morgan as written by him."

Redirect Examination.

Q. To whom is that letter addressed?

A. Cant Zachary.

Q. Who is Cant Zachary, or who was he at that time?

A. Cant Zachary? His name was Zachary; that's all I know.

Q. Who was he? What was he doing? Why did you write to him about it?

(Testimony of John Morgan.)

A. He was one of the Butte Creek Land, Live Stock & Lumber Co.

Q. How did you come to write that letter to him?

A. Why, he wrote to me. He was talking to my wife, and I wrote to him.

Q. When did he write to you—before you wrote that letter?

A. I don't know if he did or not; I got a letter from him.

Q. Part of that same matter? The letter you got from Zachary, is it a part of that same matter to which that letter refers? A. Yes, sir.

Q. Do you know where that letter is?

A. Well, I think you have got the letter.

Q. You mean the one that is addressed to you in Oakland? A. Yes, sir.

Q. By Zachary? A. Yes, sir.

Q. You mean the letter that you gave me in which he dunned you for some $200? Is that the letter you mean? A. Yes, sir.

Objected to.

Mr. BRISTOL.—I have a right to ask him about the transaction, I think.

Mr. BENNETT.—I think he has no right to ask him about the contents of the letter. If he has got the letter he can put it in, if he wants to.

(Testimony of John Morgan.)

COURT.—Not until you offer it, unless he desires to offer it himself.

Mr. BENNETT.—Well, I will offer the letter, then. I will offer it now.

Objected to.

COURT.—I think it is incompetent on cross-examination as bearing upon the credibility of the witness.

Mr. BENNETT.—That is all the purpose it is offered for, your Honor.

COURT.—For that purpose alone it is admitted.

Marked Defendant's Exhibit "B."

Q. Now, what does the sum of money referred to by you in that letter relate to?

A. Well, it relates to the money that was paid to me at the land office.

Q. Just explain what that money was originally put up for, if you can.

A. It was put up for homestead proof.

Q. Do you know who put it up?

A. Well, I don't know who put it up. I have an idea that the company put it up.

Q. Was that a part of the transaction that you referred to last night?

A. I don't know what it was last night.

(Testimony of John Morgan.)

Q. With reference to the amount of money that you were to get for your claim, I mean?

A. I don't know.

Q. Well, if there was any amount originally agreed to be paid you, if you proved up upon your claim, did you receive it, and if not, was there any other arrangement made by which you did receive an equivalent amount of money? State what the fact is in regard to that.

Objected to as immaterial and incompetent, and not binding upon the defendant in any way.

COURT.—There are references in that letter which he has a right to explain, if he can, in justice to himself, because they appear to reflect upon his credibility by reflection upon his character.

Exception allowed.

Q. Tell us what the fact is, whether you received the money that was part of the original transaction, if that is the understanding that you had, or whether you took the money referred to in that letter, or received the money that is referred to in that letter, howsoever you got it, in lieu of the money that you were to receive as you explained last night?

Mr. BENNETT.—Objected to as leading, and putting words in the witness' mouth. I think if the

(Testimony of John Morgan.)

witness is permitted to explain at all, he ought to explain, and not have the counsel explain it and have him say Amen to it.

COURT.—Oh, I don't think that is very well taken. To ask him to explain what he means, perhaps would be better. Take that passage in the letter that refers to the money, and ask him to explain the whole transaction.

Q. I call your attention to this phraseology in Defendant's Exhibit "B": "Corey told me that you said you let me have $200." Now, what did that $200 refer to, and state whether or not it was part of the transaction that you referred to last night?

A. Well, the $200 was paid in for that homestead claim. I drawed down the $200 at The Dalles. I suppose it belonged to the company. I don't know who it belonged to.

Q. Well, did it have anything to do with the transaction as the amount that you were to receive for your land, or did you just go and deliberately take it?

A. I was to receive $300 for the claim when I proved up.

Q. And this sum of $200, as I understand it, that is referred to in that letter was applied by you as a part of the transaction that you referred to last night? Is that the understanding?

(Testimony of John Morgan.)

Mr. BENNETT.—I submit, may it please your Honor, that the witness ought not to have these things put into his mouth.

Objection sustained. Question withdrawn.

Q. How much do you say you were to receive for your claim? A. Three hundred dollars.

Q. Now, state what the fact is as to whether or not the $200 referred to in that letter was used by you, or applied by you, as a part of that consideration.

Objected to as leading.

COURT.—Oh, no; that is perfectly proper, I think.

Exception.

A. It was used—that was used to buy the land with, that money was.

Q. I don't hear what you say. Please speak up so the jury can hear you.

A. It was paid in to the Government for the land, that money was. (Question read.)

A. I didn't use the money. I got the money.

Q. Well, what did you get it for? What I am trying to get at is this: Were you ever paid the $300 that you speak about? A. No, sir.

Q. Now, what did you do with this $200? Did it have any relation to the $300, or any part of it?

A. Well, yes. I intended to keep $150 of it to square the $30, and give him the remainder.

(Testimony of John Morgan.)

Recross-examination.

Q. You relinquished your claim and drew down this money? A. Yes. sir.

Q. At the same time. And that was before you wrote this letter?

A. That I relinquished it?

Q. I say, it was before you wrote this letter that you drew down the money? A. Yes, sir.

Q. You are not under any indictment?

A. Didn't I say that I would make a deal with the man in that letter? Didn't I say that I would make a deal with Mr. Zachary in that letter? Yes.

Q. Well, it was before you wrote this letter that you drew down that money? A. Yes, sir.

Q. You relinquished your claim and drew down the money, and then afterwards wrote this letter?

A. Yes, sir.

Q. You are not under any indictment?

A. Not that I know of.

Redirect Examination.

Q. What is the fact as to whether Zachary got mad at you for relinquishing or not?

Objected to as immaterial and incompetent.

A. Well, I didn't see him afterwards.

Objected to as immaterial and incompetent; more particularly so now, after this answer.

(Testimony of John Morgan.)

Q. Did he express to you in any way, other than by word of mouth, whether he was dissatisfied with your having relinquished the claim, and not performed the agreement between you and him as to the claim?

Mr. BENNETT.—Objected to. They have got that letter, and can offer it in evidence if they want to.

COURT.—That is right.

Mr. BRISTOL.—I am trying to find out whether there was such a communication.

COURT.—Answer whether there was a letter, then.

A. He wrote me a letter in regard to it, yes.

Q. Was that after or before Defendant's Exhibit "B," which appears to be dated April 12, 1904.

A. It was after.

Recross-examination.

Q. You gave that letter to Mr. Bristol, did you?

A. No, sir.

Q. You say you didn't give that letter to Mr. Bristol? A. No.

Q. But you gave the letter to Mr. Bristol that this letter is an answer to?

A. Mr. Bristol has got the letter.

(Testimony of John Morgan.)

Mr. BRISTOL.—Do you want to know where that other letter is?

Mr. BENNETT.—I know where it is now. You have got it.

Mr. BRISTOL.—I will inform you that I have not got it, if you want to know. It is not in the building, as far as that is concerned.

Mr. BENNETT.—I only go by the testimony on the stand. The witness said he gave it to you.

A. I didn't say I gave it to him.

Q. It was a letter that this was written in answer to, was it? A. Yes, sir.

Redirect Examination.

Q. What is the fact as to whether you gave the letter that you wrote in response to Defendant's Exhibit "B" to me, personally, or did you give it to somebody else, and afterwards see it in my possession?

A. I seen it in your possession. I didn't give it to you at all.

Excused.

That it should further be certified that there was other testimony on the part of the Government tending to show that Watson was in Washington county, Oregon, in December, 1900, in February, 1901, in

May, 1902, and in May, 1903; that Watson had had a conversation with the witness Bledsoe and had told the witness that he had been in Missouri in the year 1900; that this conversation occurred in July, 1901; that Charles A. Watson had worked for the witness Bradley in March and April of the year 1902; that in August, October and November, 1898, Watson had transactions with the witness Moore, who conducted a store at Greenville; and also in October, November and December of 1900, and in January, February and May, 1901, and had like transactions with the firm of Moore & Son in March, April, May, June, July, August and October, 1902; that these were personal transactions with the man Watson over the counter of the store; and the witness Ireland corroborated the witness Moore. There was evidence from the witness Butler, Clerk of Wheeler county, that Watson's name did not appear upon the registration or poll-books of that county, and by witness Godman, Clerk of Washington county, that Watson had registered in that county under date of the 19th of March, 1902; by the Witness Clymer, a postmaster at Fossil; that he had not delivered any mail for Watson but had been requested by Coe Barnard to put Charlie Watson's mail in Coe Barnard's box; that he didn't remember prior to 1903 of Watson ever getting his mail at the postoffice in Fossil.

There was other testimony tending to show that Watson had not been seen by the witnesses in Wheeler county at the times or within the periods named in the indictment, except occasionally. It was the testimony of Henry Neal, a witness, that in 1901 he heard Coe Barnard and Cant Zachary talking together about Watson going away from Wheeler county with horses and not having come back, and that Watson had not shown up at that time.

There was other testimony given by the witnesses Coombs, Scoggin, King, Parker and Kennedy, tending to corroborate the other witnesses for the Government and tending to show the facts stated in the indictment.

That there be certified as a part of the proposed bill of exceptions, on page 13 thereof, following the words "A. Homestead that he proved up on before me," the following, to wit:

Q. Well, what homestead do you know?

A. The homestead described here (referring to final proof.)

Q. What homestead?

Objected to as incompetent, immaterial, not proper cross-examination. This witness was called simply as to the question as to the character of Mr. Barnard. Now, I do not see upon what theory of cross-examina-

tion they can put a paper of this kind into his hands and proceed to examine him about it and cross-examine upon that point.

COURT.—What is the purpose of this cross-examination?

Mr. BRISTOL.—I propose to show by this witness matter affecting the reputation for truth and veracity of the defendant Coe Barnard. Nothing more, nothing less.

COURT.—Can you show it by a specific instance?

Mr. BRISTOL.—I can, your Honor. I propose to show by this witness that Coe D. Barnard, at a time before this witness as United States Commissioner, swore to the fact that he had continuously resided upon a place as a homestead other than the place fixed as his place.

COURT.—I am not asking you the specific instance. I am asking you whether you can assail reputation by specific instance or whether your question must not be confined to a general reputation?

Mr. BRISTOL.—I think, with respect to that, that generally it is confined where the matter is thought to be general without regard to any specific act, but the question in this case is this: The witness testifies generally to reputation for truth and veracity Now, if

he knows an instance or instances affecting that matter, that is, the matter concerning that part witness answered at about the same time and which entered into his estimate of the truth and veracity of the person inquired about, it would seem then to be competent, but I do not claim that you can introduce specific instances against general reputation for truth and veracity.

COURT.—That is all you can ask as to general reputation. I don't know what the best modern authority is with respect to this. There is a good deal to be said on both sides.

Mr. BRISTOL.—The Government does not wish to insist upon it if the Court feels that it is incompetent.

COURT.—You may go ahead, Mr. Bristol. Just pass this point and between now and two o'clock you can see what you want to do.

Question to the Witness.—The estimate you made of the character of the defendant was based upon what?

A. Just what his neighbors think about him generally in that community.

Q. What opportunity did you have of knowing that?

A. I have lived there in that community so long that just the same opportunity I had to know anyone's character around the neighborhood.

Q. And do you swear positively that you know nothing otherwise than that the reputation for truth and veracity of the defendant is good?

A. Yes, I do.

Q. You are sure of that, are you?

A. Yes, sir.

Q. Isn't it a fact that for a long time you have heard from the same sources, that is, his neighbors and the residents of Wheeler county, matters which did affect generally his reputation for truth and veracity? A. No, sir.

A. No, sir.

Q. You swear to that, do you? A. Yes, sir.

Q. Positively? A. Yes, sir.

Mr. BRISTOL.—Now, so far as the further cross-examination of the witness is concerned, may it please your Honor, the Government cannot pursue it further until the matter in question may be disposed of.

The witness Stewart thereupon resumed the stand, and the Court overruled the objection to the question under consideration, to which ruling the defendant excepted.

The following question was then asked the witness:

Q. What is the fact, Mr. Stewart, as to whether or not you have heard or know whether Coe D. Barnard, on or about the 23d day of June, 1904, before you as United States Commissioner, gave any testimony under oath then in a matter before you?

Mr. BENNETT.—Now, we object to that part of it in which the witness is asked to state what he may know of his own knowledge.

Mr. BRISTOL.—I said "heard or know," Judge.

Mr. BENNETT.—Well, I don't object to the "heard" part of it, but what he knows, that I object to as incompetent and not proper cross-examination.

COURT.—Now, let that go over the Judge's objection and note his exception. I understand all this testimony will be objected and the exception preserved.

The witness was then shown a paper and stated that that contained the matter to which he referred and which occurred before him as a Commissioner. The witness was then handed the paper and asked to look at it and state if he knew whose signature was upon it, and he answered that it was Mr. Bar-

nard's, and that it bore his official signature as a United States Commissioner.

Cross-examination—STEWART.

Mr. BRISTOL.—The Government proposes to offer that part of the paper, in connection with the cross-examination of the witness, concerning the homestead proof, testimony of claimant, identified by the witness as that of Coe D. Barnard.

Objected to as incompetent, immaterial, and not proper cross-examination.

Objection overruled. Exception allowed.

The paper is marked Government's Exhibit "9-A," and read in evidence.

Q. What is the fact as to your having heard, if you have heard, whether or not Coe D. Barnard was generally in the neighborhood, in Wheeler County, known as a common witness for many homestead entrymen?

Objected to as incompetent, immaterial, and not in any way detracting from the reputation of the witness, and not being proper cross-examination.

COURT.—I believe that is proper, Judge.

Mr. BENNETT.—Exception.

Mr. BRISTOL.—It is simply offered, your Honor, with the same limitation as before, as affecting the witness' answer "Good" as he made it before.

COURT.—Of course, the only way in which that could be competent would be that the fact of reputation of being a witness to a great many homestead carried with it some imputation of bad faith or degradation of character as to the person who was a witness. I don't know that that does. A man might be a witness to a great many homestead proofs.

Mr. BRISTOL.—But if, in the general rumored matter in the community, as a matter of reputation so far as this witness knows, he does know, in view of his answer "Good," that he was a professional witness, or a witness in a very, very large number of cases, it is submitted that that is a fact bearing upon the weight to be given to the witness' answer "Good," in connection with the other circumstances offered in evidence in this case.

COURT.—I don't know that it logically follows, unless there is coupled with that, that he is a witness in a great many homestead cases where the good faith of the homesteader is in question.

Mr. BRISTOL.—Very well. We will waive that matter.

COURT.—I don't think that would be competent testimony.

Mr. BRISTOL.—Question withdrawn. Take the witness.

Redirect Examination.

Q. Mr. Stewart, do you know anything about how much Coe Barnard lived on his homestead claim, that he proved up on before you?

A. Nothing except what he swore to in his proof.

Q. You don't know anything about that at all?

A. No; I know absolutely nothing about it.

Q. Do you know anything about how many improvements he had on the place? A. No, sir.

Q. Do you know anything about whether or not his family resided on the place?

A. I do not, any more than what he swore to in his proof.

Q. Do you know anything as to whether the statements made in his proof were true or false?

A. I do not.

Mr. BENNETT.—Now, your Honor, we move to strike out the final proof upon the ground that it is immaterial and incompetent, and improper cross-examination, and its only purpose can be put the defendant on trial and compel him to explain a matter which has nothing whatever to do with this case.

COURT.—Whose proof was that, that this witness testified to?

Mr. BRISTOL.—That was the proof of Coe D. Barnard, the defendant.

COURT.—On his own place?

A. Yes, sir, his own place.

Mr. BRISTOL.—On a place that he at that time was proving up on, there being evidence already in the record, offered by the defendant's witnesses in that same connection, that the family, including the defendant Barnard, never lived anywhere else than upon the home place of Barnard's on Butte Creek, during the entire period from somewhere in the neighborhood of 1898.

Motion overruled. Defendant excepts.

Excused.

Order Relative to Bill of Exceptions.

And this bill of exceptions having been duly prepared and served within the time heretofore fixed by order of the Court, and being duly corrected and amended until it corresponds with the facts of the case, is now filed with amendments attached and made a part of the records in this cause.

May 3, 1907.

WM. H. HUNT,
Judge.

United States of America,
For the District of Oregon,—ss.

I hereby certify that I have fully compared the foregoing copy with the original thereof and that the same is a full, true and correct copy of said original and of the whole thereof.

_____,
Attorney for Defendant.

Due and legal services of the foregoing bill of exceptions upon me at Portland, Oregon, this 14 day of November, 1906, is hereby acknowledged.

W. C. BRISTOL,
Attorney for Plaintiff.

Allowed and filed May 3, 1907.

J. A. SLADEN,
Clerk U. S. Circuit Court, for the District of Oregon.

Government's Exhibit "1-a."

AFFIDAVIT OF PUBLICATION.

State of Oregon,
County of Wheeler,—ss.

Jas. S. Stewart, being duly sworn, deposes and says: That he is the publisher and foreman of the "Fossil Journal," a weekly newspaper of general circulation, published at Fossil, in Wheeler County, State of Oregon, and that the notice, a printed copy of which is attached hereto, has been published in the

regular edition of said newspaper, and not in any supplement thereof, for a period of six consecutive weeks, commencing with the issue of May 13, 1904, and ending with the issue of June 17, 1904.

JAS. S. STEWART,

Subscribed and sworn to before me this 25th day of June, 1904.

[Seal] H. H. HENDERSON,
Notary Public for Oregon.

UNITED STATES LAND OFFICE.

The Dalles, Oregon, ————, 190—.

I, ————, Register, do hereby certify that a notice, a printed copy of which is hereto attached, was by me posted in a conspicuous place in my office for a period of ——— days, I having posted said notice on the —— day of ————, 190——.

————————,
Register.

NOTICE FOR PUBLICATION.

UNITED STATES LAND OFFICE,

The Dalles, Oregon, April 22d, 1904.

Notice is hereby given that the following named settler had filed notice of his intention to make final proof in support of his claim, and that said final proof will be made before Jas. S. Stewart, U. S. Commis-

sioner at his office at Fossil, Oregon, June 21st, 1904, viz.:

CHARLES A. WATSON, of Fossil, Oregon.

H. E. No. 6395 for the S. ½ NE. ¼, SE. ¼, NW. ¼ and NE. ¼ SW. ¼, Sec. 11, Tp. 6 South, Range 19 E., W. M. He names the following witnesses to prove his continuous residence upon and cultivation of said land, viz.: Halbert Bills, C. E. Zachary, Coe D. Barnard and R. V. Zachary, all of Fossil, Oregon.

MICHAEL T. NOLAN,
Register.

Government's Exhibit "2-a."

4—227.

CERTIFICATE AS TO POSTING OF NOTICE.

DEPARTMENT OF THE INTERIOR,
United States Land Office,
At The Dalles, Oregon, June 29, 1904.

I, Michael T. Nolan, Register, do hereby certify that a notice, a printed copy of which is hereto attached, was by me posted in a conspicuous place in my office for a period of thirty days, I having first posted said notice on the 22d day of April, 1904.

MICHAEL T. NOLAN,
Register.

Government's Exhibit "3-a."

4—348.

No. 1.—HOMESTEAD.

Land Office at The Dalles, Oregon,

March 23, 1904.

I, Charles A. Watson, of Fossil, Oregon, who made Homestead Application No. 6395 for the S2 NE4 SE4 NW4 and NE4 SW4 of Sec. 11, Tp. 6 S. of R. 19 E., W. M., do hereby give notice of my intention to make final proof to establish my claim to the land above described, and that I expect to prove my residence and cultivation before Jas. S. Stewart, U. S. Com., at Fossil, Oregon, on June 21, 1904, by two of the following witnesses:

Halbert Bills, of Fossil, Oregon,
C. B. Zachary, of Fossil, Oregon,
Coe D. Barnard, of Fossil, Oregon,
R. V. Zachary, of Fossil, Oregon.

CHARLES A. WATSON.
(Signature of Claimant.)

Land Office at The Dalles, Oregon,

Apr. 22, 1904.

Notice of the above application will be published in the Fossil Journal printed at Fossil, Oregon, which

I hereby designate as the newspaper published nearest the land described in said application.

MICHAEL T. NOLAN,

Register.

NOTICE TO CLAIMANT.—Give time and place of proving up and name the title of the officer before whom proof is to be made; also give names and post-office address of four neighbors, two of whom must appear as your witnesses.

Government's Exhibit "4-a."

Receiver's Duplicate Receipt No. 6395.

Application No. 6395.

HOMESTEAD.

Receiver's Office, The Dalles, Oregon,

Jany. 8, 1898.

Received of Charles A. Watson the sum of Sixteen dollars cents; being the amount of fee and compensation of register and receiver for the entry of S2 NE4 SE4 NW4 and NE4 SW4 of Section 11 in Township 6 S. of Range 19 E., under Section 2290, Revised Statutes of the United States.

WILLIAM H. BIGGS,

$16. Receiver.

NOTE. It is required of the homestead settler that he shall reside upon and cultivate the land embraced in his homestead entry for a period of five years from the time of filing the affidavit, being also the date of entry. An abandonment of the land for more than six months works a forfeiture of the claim.

Further, within two years from the expiration of the said five years he must file proof of his actual settlement and cultivation, failing to do which, his entry will be cancelled. If the settler does not wish to remain five years on his tract he can, at any time after fourteen months, pay for it with cash or land-warrants, upon making proof of settlement and cultivation from date of filing affidavit to the time of payment.

(Printed on margin in red ink.)

See note in red ink which Registers and Receivers will read and explain thoroughly to person making application for lands where the affidavit is made before either of them.

Timber land embraced in a homestead, or other entry not consummated, may be cleared in order to cultivate the land and improve the premises, but for no other purpose.

If, after clearing the land for cultivation, there remains more timber than is required for improvement, there is no objection to the settler disposing of the same. But the question whether the land is being cleared of its timber for legitimate purposes is a question of fact which is liable to be raised at any time. If the timber is cut and removed for any other purpose it will subject the entry to cancellation, and the person who cut it will be liable to civil suit for recovery of the value of said timber, and also to

criminal prosecution under Section 2461 of the Revised Statutes.

Government's Exhibit "5-a."

4—062.

NON-MINERAL AFFIDAVIT.

This affidavit can be sworn to only on personal knowledge, and cannot be made on information and belief.

The Non-Mineral Affidavit accompanying an entry of public land must be made by the party making the entry, and only before the officer taking the other affidavits required of the entryman.

DEPARTMENT OF THE INTERIOR,

United States Land Office,

The Dalles, Oregon,

June 23, 1904.

Charles A. Watson, being duly sworn according to law, deposes and says that he is the identical person who is an applicant for Government title to the S2 NE4, SE4 NW4 and NE4 SW4, Sec. 11 Tp. 6 S. R. 19 E., W. M; that he is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not, to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver,

cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposit; that the land contains no salt spring, or deposits of salt in any form sufficient to render it chiefly valuable therefor; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that his application therefor is not made for the purpose of fraudulently obtaining title to the mineral land, but with the object of securing said land for agricultural purposes; and that his post-office address is Fossil, Oregon.

CHARLES A. WATSON.

I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me by ————), and that I verily believe him to be a credible person and the person he represents himself to be, and that this affidavit was subscribed and sworn to before me at my office in Fossil, Ore-

gon, within the Dalles, Oregon, land district, on this 23d day of June, 1904.

JAS. S. STEWART,
U. S. Com. for Oregon.

NOTE.—The officer before whom the deposition is taken should call the attention of the witness to the following section of the Revised Statutes, and state to him that it is the purpose of the Government, if it be ascertained that he testifies falsely, to prosecute him to the full extent of the law:

REVISED STATUTES OF THE UNITED STATES.
Title LXX.—CRIMES.—Chap. 4.

Sec. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment at hard labor, not more than five years, and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See Sec. 1750.)

Government's Exhibit "6-a."

State of Oregon,
County of Wheeler.

Charles A. Watson, being first duly sworn, deposes and says: I am the identical person who made final proof on homestead entry No. 6395 before Jas. S. Stewart, United States Commissioner, at his office in Fossil, Oregon, on June 23, 1904. The reason that I did not proof on June 21, 1904, as advertised, was that my witnesses were engaged in the

annual ride for calves in this neighborhood, and could not leave to go to town till to-day.

CHARLES A. WATSON.

Sworn to and subscribed before me this 23d day of June, 1904, at my office in Fossil, Ore.

JAS. S. STEWART,
U. S. Com. for Oregon.

Government's Exhibit "7-a."

4-369.

HOMESTEAD PROOF—TESTIMONY OF WITNESS.

Coe D. Barnard, being called as witness in support of the homestead entry of Charles A. Watson for S2 NE4, SE4 NW4 and NE4 SW4 Sec. 11, Tp. 6 S., R. 19 E. W. M., testifies as follows:

Ques. 1.—What is your name, age, and post-office address?

Ans. Coe D. Barnard, age 31 years, Fossil, Ore.

Ques. 2.—Are you well acquainted with the claimant in this case and the land embraced in his claim?

Ans. Yes.

Ques. 3.—Is said tract within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business?

Ans. No.

Ques. 4.—State specifically the character of this land—whether it is timber, grazing, farming, coal, or mineral land.

Ans. Grazing land, rough and mountainous.

Ques. 5.—When did claimant settle upon the homestead, and at what date did he establish actual residence thereon?

Ans. In the Spring of 1898; established residence at the same time.

Ques. 6.—Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried, state the fact.)

Ans. Yes, except as stated below. He is unmarried. I live about eight miles from settler's place. In riding for my stock I frequently ride past his place and stop at his house.

Ques. 7.—For what period or periods has the settler been absent from the land since making settlement, and for what purpose; and if temporarily absent, did claimant's family reside upon and cultivate the land during such absence?

Ans. He made a trip to the Willamette Valley in July, 1902, for the benefit of his health, and returned in October, 1902.

Ques. 8.—How much of the homestead has the settler cultivated, and for how many seasons did he raise crops thereon?

Ans. About two acres; he raised a garden on it every year since 1898. The rest of the land is too

steep, rough and rocky for cultivation. He pastures about 25 head of his horses on the place.

Ques. 9.—What improvements are on the land, and what is their value?

Ans. Lumber house 12x16 lumber roof, lumber floor, one room, ceiled and papered, good spring water; all fenced with 3-wires; total value improvements about $250.00; one door and one window.

Ques. 10.—Are there any indications of coal, salines, or minerals of any kind on the homestead? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans. No.

Ques. 11.—Has the claimant mortgaged, sold, or contracted to sell, any portion of said homestead?

Ans. Not to my knowledge.

Ques. 12.—Are you interested in this claim; and do you think the settler has acted in entire good faith in perfecting this entry?

Ans. No. Yes.

[Sign plainly with full Christain name.]

COE D. BARNARD.

I hereby certify that the foregoing testimony was read to the witness before being subscribed and was

sworn to before me this 23d day of June, 1904, at my office at Fossil, in Wheeler County, Oregon.

[See note on fourth page.]

JAS. S. STEWART,
U. S. Com. for Oregon.

(The testimony of witnesses must be taken at the same time and place and before the same officer as claimant's final affidavit. The answers must be full and complete to each and every question asked, and officers taking testimony will be expected to make no mistakes in dates, description of land, or otherwise.)

4—369.

HOMESTEAD PROOF—TESTIMONY OF WITNESS.

Clarence B. Zachary, being called as witness in support of the homestead entry of Charles A. Watson for S2 NE4 SE4 NW4 and NE4 SW4, Sec. 11, Tp. 9 S., R. 23 E., W. M., testifies as follows:

Ques. 1.—What is your name, age and post-office address?

Ans. Clarence B. Zachary, age 39 years, Fossil, Ore.

Ques. 2.—Are you well acquainted with the claimant in this case and the land embraced in his claim?

Ans. Yes.

Ques. 3.—Is said tract within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business?

Ans. No.

Ques. 4.—State specifically the character of this land—whether it is timber, prairie, grazing, farming, coal, or mineral land.

Ans. Grazing, very rough, steep and rocky.

Ques. 5.—When did claimant settle upon the homestead, and at what date did he establish actual residence thereon?

Ans About six years ago he built a house and took up his residence therein.

Ques. 6.—Have claimant and family resided continuously on the homestead since first establishing residence thereon? (If settler is unmarried, state the fact.)

Ans. Yes, except as stated below; he is unmarried.

Ques. 7.—For what period or periods has the settler been absent from the land since making settlement, and for what purpose; and if temporarily absent, did claimant's family reside upon and cultivate the land during such absence?

Ans. From July until October, 1902, when he made a trip to the Willamette Valley to see his parents.

Ques. 8.—How much of the homestead has the settler cultivated, and for how many seasons did he raise crops thereon?

Ans. About two acres of creek bottom garden land, the rest of the land is too rough and rocky for

cultivation. He pastures from 20 to 30 head of horses on the place.

Ques. 9.—What improvements are on the land, and what is their value?

Ans. Good lumber house 12x14, lumber roof; one window and one door, good spring water; place is all inclosed with 3-wire fence, house is ceiled and papered and is comfortable at all times of the year. Total value of improvements $250.00. I live 1½ miles from his place.

Ques. 10.—Are there any indications of coal, salines, or minerals of any kind on the homestead? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans. No.

Ques. 11.—Has the claimant mortgaged, sold, or contracted to sell, any portion of said homestead?

Ans. Not that I know of.

Ques. 12.—Are you interested in this claim; and do you think the settler has acted in entire good faith in perfecting this entry?

Ans. No. Yes.

[Sign plainly with full Christian name.]

CLARENCE B. ZACHARY,

I hereby certify that the foregoing testimony was read to the witness before being subscribed and was

sworn to before me this 23d day of June, 1904, at my office at Fossil, in Wheeler County, Oregon.

[See note on fourth page.]

JAS. S. STEWART,
U. S. Com. for Oregon.

(The testimony of witnesses must be taken at the same time and place and before the same officer as claimant's final affidavit. The answers must be full and complete to each and every question asked, and officers taking testimony will be expected to make no mistakes in dates, description of land, or otherwise.)

Government's Exhibit

4—369.

HOMESTEAD PROOF——TESTIMONY OF CLAIMANT.

Charles A. Watson, being called as a witness in his own behalf in support of homestead entry No. 6395, for S2 NE4, SE4 NW4 & NE4 SW4, Sec. 11, Tp. 6 S. of R. 19 E., W. M., testifies as follows:

Ques. 1.—What is your name, age, and post-office address?

Ans. Charles A. Watson, age 31, Fossil, Oregon.

Ques. 2.—Are you a native-born citizen of the United States, and if so, in what State or Territory were you born?*

---

* In case the party is of foreign birth a certified transcript from the court records of his declaration of intention to become a citizen, or of his naturalization, or a copy thereof, certified by the officer taking this proof, must be filed with the case. Evidence of naturalization is only required in final (five-year) homestead cases.

Ans. Yes; born in Missouri.

Ques. 3.—Are you the identical person who made homestead entry No. 6395, at the Dalles, Oregon, land office on the 8th day of January, 1898, and what is the true description of the land now claimed by you?

Ans. S2 NE4, SE4 NW4 and NE4 SW4 Sec. 11, Tp. 6 S., R. 19 E., W. M.

Ques. 4.—When was your house built on the land and when did you establish actual residence therein? (Describe said house and other improvements which you have placed on the land, giving total value thereof.)

Ans. House was built on land in March, 1898; established residence therein at that time. House is of lumber, size 12 x 14, lumber roof, good lumber floor, one door and one window, stovepipe in roof, well protected from fire, house is ceiled with rough lumber and papered, good spring water; two acres garden plowed on creek bottom; rest of land is too steep and rough for cultivation; house is comfortable and habitable at all times of year. Place is all fenced with three-wire fence. Total value of improvements, $250.

I have pastured on an average fifteen head of my horses on the place each year, sometimes a greater number and sometimes less.

Ques. 5.—Of whom does your family consist; and have you and your family resided continuously on the land since first establishing residence thereon? (If unmarried, state the fact.)

Ans. Myself; I am unmarried. Yes, except as stated below.

Ques. 6.—For what period or periods have you been absent from the homestead since making settlement, and for what purpose; and if temporarily absent, did your family reside upon and cultivate the land during such absence?

Ans. Was sick in year 1902, when I visited my parents in Washington Co., Oregon; I went there in July, 1902, and returned in October, 1902.

Ques. 7.—How much of the land have you cultivated each season, and for how many seasons have you raised crops thereon?

Ans. About two acres, raised a garden on same every year since I took it up in 1898.

Ques. 8.—Is your present claim within the limits of an incorporated town or selected site of a city or town, or used in any way for trade and business?

Ans. No.

Ques. 9.—What is the character of the land? Is it timber, mountainous, prairie, grazing, or ordinary agricultural land? State its kind and quality, and for what purpose it is most valuable.

Ans. Grazing land, steep and very rough, most valuable for grazing.

Ques. 10.—Are there any indications of coal, salines, or minerals of any kind on the land? (If so, describe what they are, and state whether the land is more vauable for agricultural than for mineral purposes.)

Ans. No.

Ques. 11.—Have you ever made any other homestead entry? (If so, describe the same.)

Ans. No.

Ques. 12.—Have you sold, conveyed, or mortgaged any portion of the land; and if so, to whom and for what purpose?

Ans. No.

Ques. 13.—Have you any personal property of any kind elsewhere than on this claim? (If so, describe the same, and state where the same is kept.)

Ans. No.

Ques. 14.—Describe by legal subdivisions, or by number, kind of entry, and office where made, any other entry or filing (not mineral), made by you since August 30, 1890.

Ans. None.

[Sign plainly with full Christian name.]

CHARLES A. WATSON.

I hereby certify that the foregoing testimony was read to the claimant before being subscribed, and was

sworn to before me this 23d day of June, 1904, at my office at Fossil, in Wheeler County, Oregon.

[See Note Below.] JAS. S. STEWART.
U. S. Com. for Oregon.

NOTE.—The officer before whom the testimony is taken should call the attention of the witness to the following section of the Revised Statutes, and state to him that it is the purpose of the Government, if it be ascertained that he testified falsely, to prosecute him to the full extent of the law.

Title LXX.—CRIMES.—Ch. 4.

Sec. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment at hard labor, not more than five years, and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See § 1750.)

[Endorsed]: 4—369. Homestead Proof. Land Office at The Dalles, Oregon. Original Application No. 6395. Final Certificate No. ———. Approved: ————, Register. ————, Receiver. Suspended, Pending Investigation by Special Agent, Thos. B. Neuhausen. Michael T. Nolan, Register. Annie M. Lang, Receiver.

FINAL AFFIDAVIT REQUIRED OF HOMESTEAD CLAIMANTS.

Section 2291 of the Revised Statutes of the United States.

I, Charles A. Watson, having made a homestead entry of the S2 NE4, SE4, NW4 and NE4, SW4, Section No. 11, in Township No. 6 S. of Range No. 19 E., W. M., subject to entry at The Dalles, Oregon, land office, under section No. 2289 of the Revised Statutes, do now apply to perfect my claim thereto by virtue of section No. 2291 of the Revised Statutes of the United States; and for that purpose do solemnly swear that I am a native born citizen of the United States; that I have made actual settlement upon and have cultivated and resided upon said land since the —— day of March, 1898, to the present time; that no part of said land has been alienated, except as provided in section 2288 of the Revised Statutes, but that I am the sole bona fide owner as an actual settler; that I will bear true allegiance to the Government of the United States; and, further, that I have not heretofore perfected or abandoned an entry made under the homestead laws of the United States,

[Sign plainly with full Christian name.]

CHARLES A. WATSON.

I, Jas. S. Stewart, of Fossil, Oregon, do hereby certify that the above affidavit was subscribed and sworn to before me this 23d day of June, 1904, at my office at Fossil, in Wheeler County, Oregon.

JAS. S. STEWART,
U. S. Com. for Oregon.

Clerk's Certificate to Exhibits Attached to Bill of Exceptions (Copy).

United States of America,
District of Oregon,—ss.

I, J. A. Sladen, Clerk of the Circuit Court of the United States for the District of Oregon, do hereby certify that the foregoing copies of exhibits numbered from 1-A to 7-A, inclusive, are true and complete copies of the exhibits and all of the exhibits, introduced in evidence upon the trial of cause No. 2941, The United States of America vs. Coe D. Barnard, said exhibits being certified and attached to the bill of exceptions in said cause and made a part of said bill of exceptions pursuant to the order of said Court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Portland, in said District, this 9th day of August, A. D. 1907.

[Seal] J. A. SLADEN,
Clerk.

And afterwards, to wit, on the 3d day of May, 1907, there was duly filed in said court a copy of order extending time to file transcript of record, in words and figures as folows, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 2943—May 3, 1907.

UNITED STATES OF AMERICA,

vs.

COE D. BARNARD.

Order Extending Time to File Record.

Now, at this day, comes the above-named plaintiff, by Mr. William C. Bristol, United States Attorney, and the defendant herein, by Mr. A. S. Bennett, of counsel, and thereupon, upon agreement of the parties hereto, it is hereby ordered, that the time heretofore allowed said defendant in which to file his transcript of record in this cause, in the United States Circuit Court of Appeals for the Ninth Circuit be, and it is hereby, extended to the 1st day of September, 1907.

WILLIAM H. HUNT,

Judge.

Filed May 3, 1907. J. A. Sladen, Clerk U. S. Circuit Court for the District of Oregon.

Clerk's Certificate to Transcript of Record.

United States of America,
District of Oregon,—ss.

I, J. A. Sladen, Clerk of the Circuit Court of the United States for the District of Oregon, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the foregoing pages numbered from 5 to 173, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The United States of America, plaintiff, and defendant in error, vs. Coe D. Barnard, defendant, and plaintiff in error, as the same appears of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing transcript is ninety-three 70/100 dollars, and that the same has been paid by said plaintiff in error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this 27th day of August, A. D. 1907.

[Seal] J. A. SLADEN,
Clerk.

[Endorsed]: No. 1499. United States Circuit Court of Appeals for the Ninth Circuit. Coe D. Barnard, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the District of Oregon.

Filed September 6, 1907.

FRANK D. MONCKTON,
Clerk.
By Meredith Sawyer,
Deputy Clerk.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

COE D. BARNARD,
Plaintiff in Error.

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

BENNETT & SINNOTT,
Attorneys for Plaintiff in Error.

The Dalles, Oregon:
A. N. Bohn, Book and Job Printer
305½ Second St.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

COE D. BARNARD,
Plaintiff in Error.
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

The Plaintiff in Error was indicted in the United States Circuit Court for the District of Oregon, upon the charge of perjury in the

matter of the final proof of one Charles A. Watson, upon the homestead claim of the said Watson in Gilliam county, Oregon, and upon which proof the Plaintiff in Error is alleged to have been a corroboratory witness.

The defendant demurred to the indictment, but the demurrer was overruled, and a trial was had resulting in a verdict of conviction of the defendant, with a recommendation to the mercy of the court, and resulted in the sentencing of the defendant to two years at McNeil's Island.

The questions involved in the case are as follows:

1.

WAS THE INDICTMENT SUFFICIENT.

This question is raised by demurrer and is based upon the omission of the indictment to allege either directly or indirectly that the commissioner before whom the oath is alleged to have been taken had authority to administer THIS PARTICULAR OATH, or in the alternative of this, the omission to allege that the preliminary proceedings and notice had been taken, which would have given him such authority, and made the proof a valid proof, and further

3.

upon the claim that there was not sufficient allegation that the testimony in question was material TO SUCH FINAL PROOF.

2.

That the court erred in permitting different witnesses to testify to oral statements made in a narrative way by said Charles Watson in the absence of this plaintiff in error, these questions arising on exceptions duly preserved and presented in the record.

3.

The admission of evidence of other similar (assumed) perjuries of this plaintiff in error in the matter of other proofs in relation to the homestead of other claimants in no way connected with the claim of Watson and subsequent thereto, and there not appearing to be any common system or connection between these different claims.

4.

In permitting the prosecution to cross examine the witness Stewart (called as a witness to the good reputation of the plaintiff in error) as to statements sworn to by said plaintiff in making his own homestead proof before said witness and in permitting the prosecution to offer evidence tending to show that some of said statements were false, in other words, to disprove the good character of plaintiff in error *by specific instances of alleged wrongdoing*.

5.

In permitting the government to introduce

independent testimony for the purpose of showing that the plaintiff in error had violated the law in the matter of his own final proof.

6.

In permitting the state to offer evidence tending to show that the claimant, Charles A. Watson, had made statements out of court in the absence of plaintiff in error tending to blacken and prejudice his own character and incidentally and indirectly, that of the defendant, to the effect that he, (Watson) had been run out of the country, where the claim was, for horse stealing, and that parties in that vicinity wanted him to come back, but that he was afraid to on account of such horse stealing, etc.

All of these questions except the first, are raised by exceptions to the admission of the testimoney duly embodied in the record.

7.

Error in the refusal of certain instructions asked for by the plaintiff in error at the trial. One, to the effect that the jury should not permit clamor or public opinion to influence their verdict, and two others, directing that they could not find the defendant guilty upon the falsity of certain portions of his proof not alleged to be false in the indictment.

These questions were raised by instructions duly presented at the proper time and by the exceptions to the refusal.

SPECIFICATIONS OF ERROR.

The errors upon which the plaintiff in error will specifically urge and rely for the reversal of this proceeding are

1.

First.—That the said Circuit Court erred in overruling the demurrer of the said defendant Coe D. Barnard to the indictment filed in the said cause, demurring to the said indictment.

Second.—In overruling the objection of the said defendant to the question asked the witness E. A. Putnam as follows;

Q, State whether or not there was anything in the conversation that showed, or tended to show, where Watson had been about that time or immediately preceeding it?

And in permitting the witness to answer the question as follows:

A. He said he had his foot cut at the time —he said he had been working on the Columbia River, down about St. Helens, somewhere, and said he was going home and going out to where his folks lived.

Third.—In overruling the defendant's objection to the following question asked of the witness:

Q. Did he say where that was?

And in permitting the witness to answer the same:

A. Yes, sir, out towards Forest Grove, out in Washington County.

Fourth—In overruling the defendant's objection to the following question asked of the said witness:

Q. What was the logging camp, did he state?

And in permitting the witness to answer the same:

A. It was somewheres about St. Helens, somewhers down about in there, I think it was.

Fifth.—In overruling the objection of the defendant to the question asked of one William Shepard while on the stand as a witness for the Government in said cause, the quesiton was as follows:

Q. And did he state at that time, or in connection with that same matter, while you were conversing, the reason why he didn't go back to it?

And in permitting the witness to answer the same as follows:

A. Well, he asked me how it would be for him to go back there, and I answered, if you are making a good living here and trying to be honest you had better stay where you are.

Sixth.—In overruling the defendant's objection to the following question asked the witness Shepard:

Q. What was the rest of the conversation, if any?

And in permitting the witness to answer the same as follows:

A. Well, it was about the horses he brought down. I asked him what prices he got for them, and so on.

Seventh.—In overruling the objection of the defendant to the question asked of the said witness Shepard as follows:

Q. What was the fact about their saying anything at that time about the ranch?

And in permitting the witness to answer the same as follows:

A. He said he wanted to go back and prove up.

Eighth.—In overruling the defendant's objection to the question asked of the said witness as follows:

Q. Did he say why?

And in permitting said witness to answer the same as follows:

A. He said parties wanted him to go back and prove up.

Ninth.—In overruling the defendant's objection to the question asked of the witness as follows:

Q. Did he say why?

And in permitting the said witness to answer the same as follows:

A. He said parties wanted him to go back.

Tenth.—In overruling the objection of the defendant to the following question asked the said witness:

Q. Whom did he say wanted him to go back?

And in permitting said witness to answer the same:

A. He had reference to Mr. Hendricks.

Eleventh.—In overruling the defendant's objection to the question asked the said witness as follows:

Q. And did he give you any reason as to why he would not go back?

And in permitting said witness to answer the same:

A. He didn't think the people wanted him, I guess.

Twelfth.—In overruling the defendant's objection to the question asked of said witness, as follows:

Q. Did he tell you why?

And in permitting said witness to answer the same, as follows:

A. No, he didn't tell me exactly.

Thirteenth.—In overruling defendant's objection to the question asked of said witness as follows:

Q. Did he give you any reason why?

And in permitting said witness to answer the same:

A. Well, all the reason was that there were some horses run off that spring, and he was hired to do it, and he didn't suppose the settlers wanted him to go back.

Fourteenth.—In overruling and denying the motion of the defendant to strike out the con-

versation between the said witness Shepard and Watson, on the ground that the same was incompetent and hearsay against the defendant, and to the ruling of the Court that the same was competent and relevant and admissible as bearing on the question or the residence of by Watson.

Fifteenth.—In overruling the defendant's objection to the question asked of the witness John Morgan as follows:

Q. Whereabouts?

And in permitting said witness to answer said question:

Sixteenth.—In overruling the defendant's objection to the offer of the District Attorney to show that, "At the time the witness proved up, C. D. Barnard was one of the witnesses, at that time we will show that this witness never had resided and never did reside on that claim, we will show it as a similar act."

And in holding that the same was competent and material.

Seventeenth.—In overruling the defendant's objection to the question asked the said witness as follows:

Q. What is the fact Mr. Morgan as to

who your witnesses were at the time you made this purported proof.

Eighteenth.—In overruling the defendant's objection to the final proof papers of the said John Morgan and in permitting the same to be offered, received and read in evidence.

Nineteenth.—In overruling the objection of the defendant to the question asked of the said witness Morgan as follows:

Q. Now, as to the homestead, Mr. Morgan, that is covered by Government's Exhibit "A," which you have identified, tell the Court and jury as to what is the fact as to whether or not you ever established an actual residence upon it, ever cultivated it or actually continued to reside upon it for the period set forth in this proof?

And in permitting said witness to answer the same:

A. No, I didn't live on it—I did not cultivate it.

Twentieth.—In overruling the defendant's objection to the following question asked of the witness Morgan:

Q. I notice question 12, "Have you sold, conveyed, or mortgaged any portion of the land

and if so to whom, and for what purpose," and I see the answer is written, no. At the time you made your proof what is the fact as to your having any agreement as to your claim?

And in permitting the witness to answer the said question:

A. Well I had taken the claims for the Butte Creek Company.

And in the ruling of the said Court holding said question, and answer proper and competent as tending to show system, knowledge, and intent upon the part of the defendant.

Twenty-first.—In overruling the defendant's objection to the following question asked of the witness, Morgan:

Q. What Butte Creek Company?

And in permitting the witness to answer the same, as follows:

A. The Butte Land, Livestock and Lumber Company.

Twenty-second.—In overruling the defendant's objection to the following question asked of said witness:

Q. How did you come to take it for it?

And in permitting the said witness to answer the same as follows:

A. Well, Mr. Zachary asked me to take it up and that is how I came to take it up.

Twenty-third.—In overruling and denying defendant's motion to strike out the aforesaid answer of the witness that "Well, Mr. Zachary asked me if I would take it up and that is how I came to take it up," upon the ground that the same is incompetent, and immaterial and in not allowing the said motion.

Twenty-fourth.—In overruling the defendant's objection to the question asked of the witness James S. Stewart, as follows:

Q. State whether or not you recognized it. (Government's Exhibit "A")

And in permitting the said witness to answer the same:

A. It is the homestead proof made by John Morgan before me.

Twenty-fifth.—In overruling the defendant's objection to the question asked of the said witness James S. Stuart as follows:

Q. Does it show the accompanying testimony adduced from his witnesses in reference to the same matter?

And in permitting the said witness to answer the same:

A. Yes, sir.

Twenty-sixth.—In overruling the defend-

ant's objection to the question asked of the said witness as follows:

Q. State who the witnesses were who appeared before you at the time and if not at the same time, about the same time in connection with the matter?

And in permitting the said witness to answer the same:

A. One is Robert Zachary and one is Coe Barnard.

Twenty-seventh.—In overruling the defendant's objection to the following question asked of the said witness?

Q. Inform the jury as to what the fact is as to whether the Coe Barnard is the same Coe Barnard, the defendant in this case?

And in permitting the said witness to answer the same:

A. Yes, Sir.

Twenty-eighth.—In overruling the defendant's objection to the following question asked the said witness:

Q. Who signed it?

And in permitting the said witness to answer the same:

A. Mr. Barnard.

Twenty-ninth.—In overruling the defendant's objection to the following question asked of the said witness, James S. Stewart, called as a witness for defendant on his cross-examination:

Q. What homestead do you know?

And in permitting him to answer the same:

A. The homestead described here (indicating the final proof which had been shown him.)

Thirtieth.—In overruling the defendant's objection to that part of the question asked of the said witness Stewart, on said cross-examination in which the said witness was asked to state as to what he knew as to what Coe D. Barnard had sworn, of his own knowledge, the question being as follows:

Q. What is the fact Mr. Stewart, what is the fact as to whether or not you have heard or know whether Coe D. Barnard on or about the 23d day of June, 1905, before you as United States Commissioner gave any testimony under oath in the matter before you?

And in permitting the witness to answer the same.

Thirty-first.—In overruling the defendant's objection to the admission of the final proof papers of Coe D. Barnard.

And in permitting the same to be offered as a part of the cross-examination of said witness and to be received and read in evidence therein.

Thirty-seventh.—In failing and refusing to instruct the jury as requested by the defendant as follows:

"You should not permit and clamor or public opinion, real or imagined, to prevent you from giving the defendant a fair trial, and the benefit of all reasonable doubt."

Thirty-eighth.—In failing and refusing to instruct the said jury as requested by the defendant as follows:

"No mere carelessness or recklessness on the part of the defendant in giving his evidence in the Watson final proof will sustain the charge of perjury in this case, but it will be made to appear beyond a reasonable doubt that his statements were willfully and intentionally false, and that he did not believe them to be true."

Fortieth.—In failing and refusing to instruct said jury as requested by the said defendant as follows:

"You cannot find the defendant guilty of perjury in the matter of the statement that there was about two acres in cultivation."

Forty-first.—In failing and refusing to in-

struct said jury as requested by the defendant as follows:

"You cannot find the defendant guilty in this cause on account of any falsity, real or supposed as to the statement in the proof that there was a house or fencing on the land,"

ARGUMENT.

THE DEMURRER TO THE ARGUMENT.

It is submitted to the Court that the indictment in this case was insufficient in two respects:

First, because there was no allegation that the commissioner in question had any authority TO ADMINISTER THIS PARTICULAR OATH, or take this particular proof at the time it was taken, and in the alternative of this, there was no allegation of the preliminary facts which would give him authority to take this particular proof,

And second, that it is not sufficiently shown that the testimony in question was material TO THIS PROOF.

NO ALLEGATION THAT THE COMMISSIONER WAS AUTHORIZED TO ADMINISTER AN OATH IN THIS PARTICULAR CASE. —

It is true there is an allegation that the commissioner was an officer authorized by law to

administer SUCH OATHS, but this a mere allegation of his general authority to administer oaths in the matter of homestead proofs which as a matter of law the court would take judicial notice of, without any allegation whatever.

Now in addition to this general authority to administer oaths in such cases, the officer in question must have jurisdiction, as it were, of *the particular case*, before he can lawfully take a proof or administer an oath therein.

That is, there are certain preliminary requirements of the law in each individual case that must be complied with before the commissioner has authority to take proof or administer an oath in *that particular matter.*

The Act of March 3, 1879, Chapter 192, provides:

"*That before final proof shall be submitted* by any person claiming to gener agriculture lands under the laws providing for pre-emption or homestead entries, such person shall file with the register of the proper land office a notice of his or her intention to make such proof, stating therein the description of lands to be entered, the names of the witnesses by whom the necessary facts will be established. Upon the filing of such notice, the register shall publish a notice, that such application has been made once a week for the period of thirty days, in a newspaper to be by him designated as published nearest to such land, and he shall also post

such notice in some conspicuous place in his office for the same period. Such notice shall contain the names of the witnesses as stated in the application. *At the expiration of said period of thirty days, the claimant shall be entitled to make final proof* in the manner heretofore provided by law. The Secretary of the Interior shall make all necessary rules for giving effect to the foregoing provisions."

So it is perfectly plain that before any valid proceedings can be had in the way of making final proof upon a homestead claim, and before a commissioner has any authority to take proof or administer an oath, these preliminary requirements must be complied with, namely, a notice of intention must be filed with the register of the land office stating the names of the witnesses, etc., and a notice must be published in a newspaper for a definite length of time, and another notice must be posted in the land office. *Until this is done, any attempt to make proof is a mere nullity, utterly invalid, and of no effect whatever.*

Under Section 5396 of the Revised Statutes it would have been sufficient to make a direct allegation that the commissioner in question had the authority to administer the PARTICULAR OATH upon which the perjury is based.

But here there is no such allegation and the only allegation is that of the general authority of the commissioner under the law to administer

oaths in such cases, that is in homestead proceedings, the allegation being

"came in person before Charles S. Stewart, who was then and is, the duly appointed, qualified and acting United States Commissioner for the District of Oregon, and who was and is an officer who was authorized BY THE LAWS OF THE UNITED STATES to administer an oath, and to take testimony of witnesses in the matter of an application of a claimant to make final proof upon a homestead entry of public lands of the United States in the said District of Oregon."

This is a mere general allegation of the general authority of the commissioner under the law, to take proof in such cases. There is no allegation that he had authority to administer oaths or take proof *in this particular case*, and as we have seen he did not (notwithstanding his general authority under the law to take proof in homestead cases) have the authority to administer an oath or take proof in this particular case unless the notice had been published, and the other preliminary requirements had, which gave him such authority to take proof in the particular case.

It will be found by an examination of the authorities that it is usual to allege directly that the officer had authority to "ADMINISTER SAID OATH," but here there was no such allegation, nor was there any such allegation as is required at common law, showing that the steps had been taken to give such authority.

It is perfectly clear under the authorities that one of these two methods must be followed,

and the pleader must either follow the statute and allege directly that the officer had authority to administer the particular oath in question, or the alternative common law proceeding and allege (in such cases as this) that the proper notice had been given, posted, etc., and the preliminary requirements attended to, which would give the commissioner authority to so administer the oath.

2 Bishop's New Cr. Pro. Sec. 910 & 914.

Wharton's Cr. Law (8th Ed.) Sec. 1290-91.

This is like the case where perjury before a court is charged, and the pleader simply alleges that the oath was administered by the clerk of court, "who was then and there an officer authorized by law to administer oaths," without alleging either that he had authority to administer an oath in this particular case, or that any complaint had been filed or proceedings had which would give the court jurisdiction to administer the particular oath.

The indictment then proceeds to allege in a rambling sort of a way that Stewart was then engaged in hearing testimony in the matter of the Watson final proof, and that a homestead had been filed by the said Watson,

etc.,'' containing perhaps sufficient compliance with other requirements in this regard, but no where alleging either that Stewart had authority to take this final proof, or in the alternative that any notice had been given which would give him any such authority.

It seems to us, that judged by any right reasoning the indictment was clearly insufficient in this regard. We know that it is sometimes said that in these land fraud cases ''anything goes'' and that the pleaders are not required to observe the ordinary essentials of the indictment, and that any defect in the indictment can be supplied in the evidence, but we see no reason why this should be so, or why the defendant should not have the same rights and have the same rules applied to him as in other cases, and judged by these rules we submit to the court that it is perfectly clear that the indictment in this case is absolutely insufficient and cannot be sustained.

NO SUFFICIENT ALLEGATION AS TO MATERIALITY.——Here the proposition is not so clear as in the other particular, because there is some attempt to allege the materiality of the testimony, and much rambling and somewhat incoherent matter in relation thereto, but we submit that there is no where a direct allegation that the particular testimony

alleged to be false was material TO THE FINAL PROOF IN QUESTION. The allegation is that "it was material that Stewart, the commissioner and the register and receiver of the land office at The Dalles should know and be informed from and by the said testimony, etc., etc.," and there is no allegation that it was material to the proceeding or final proof in question.

The proof in a homestead case finally goes to the Department at Washington, and is acted upon there and patent issued from there. The duties of the United States Commissioner in taking this proof are merely clerical, and the duties of the register and receiver are largely so. The taking of the final proof and the proceedings thereunder are not for their benefit, but for the benefit of the government, and we contend that the allegation in this case should have been that the testimony in question was material in and to the taking of such final proof and that this allegation should have been direct and certain, and not rambling and incoherent.

ADMISSION OF HEARSAY EVIDENCE.——Statements made by the claimant Watson out of Court.

Over the objection of the defendant the prosecution was permitted to prove alleged oral statements made by Watson tending to show that Watson did not reside upon the land in question, and therefore that the statements of the defendant in his affidavit in that regard were false:

One E. A. Putman was called as a witness and after testifying to meeting the claimant Watson, the following proceedings were had:

Q. State whether or not there was anything in that conversation that showed or tended to show where Watson had been about that time or immediately preceeding it?

To which the defendant objected as incompetent and in not any way binding upon the defendant in this cause and as hearsay and as not

the best evidence, but the objection was overruled and the defendant excepted.

The Court saying, "It is understood the question is admitted solely as bearing upon the question as to whether or not Watson did state the truth in regard to the answers that he made in making his proof."

Whereupon the witness answered, "He said he had cut his foot at the time—he said he had been working on the Columbia River, down about St. Helens, somewhere, and said he was going home, and going out to where his folks lived.

Q. Did he say where that was?

Same objection, ruling and exception.

A. Yes, sir, out towards Forest Grove, out in Washington County.

Q. What was the logging camp, did he state?

Same objection ruling and exception.

A. It was somewheres about St. Helens, somewhere down about in there, I think it was.

This testimony was obviously offered on the theory that because Watson was a claimant and because it was necessary to show that this claimant did not in fact live on the land in question, that this essential fact might be proven by the oral declarations of Watson made in the absence of the defendant, and without giving

him any attempt to cross examine said Watson.

In other words, that the prosecution might --AS AGAINST THIS DEFENDANT—prove the fact that Watson did not in fact reside on the land, and therefore that defendant's affidavit was false by *hearsay evidence.*

We submit to the court that it needs no argument to show that this was error, and that as against this defendant, the alleged fact of Watson's non-residence on the land must be proved in this same way as any other fact, by the sworn testimony of witnesses called and examined before the jury, with full opportunity for cross examination and not by oral declarations made out of court.

The fact that Watson was the claimant and that his declarations were against interest could make no difference, first, because there was no claim THAT HE WAS DEAD OR OUT OF THE STATE, and, second, because such admissions are never admissible for or against the defendant in a criminal case.

Reeves vs. State, 6 Wymg. 240, 44 Pac. 64.
Morrison vs. State, 5 Ohio 38.
Commonwealth vs. Thompson, 99 Mass. 444.
Brown vs. State, 57 Miss. 424.
State vs. Ah Tom, 8 Nev. 217.
State vs. Fletcher, 24 Ore. 295.
Smith vs. State, 9 Ala. 995.

Welch vs. State, 96 Ala. 92.
People vs. Hall, 94 Cal. 592.
Lion vs. State, 22 Ga. 399.
Kelley vs. State, 82 Ga. 441.

In the case of Morrison vs. State cited form the 5 Ohio the defendant was charged with concealing Driskell, an alleged horse thief. In order to sustain the charge it was necessary of course for the state to prove that Driskell was a horse thief, and for this purpose the declarations of Driskell were admitted in evidence. The court says:

"The proof here was not directed to make out a scienter in Morrison, but the fact of Driskells having stolen the horse. In this view, it appears to us that the court admitted the declaration of one not a party to the record, nor a confederate, to sustain a material allegation that said person was a horse thief in general terms, and that too without any proof that a horse had been in fact stolen by or from any person known or unknown. Such declarations for such a purpose we think clearly incompetent."

So in the Thompson case cited from the 99 Mass., a man and woman were indicted together for adultry and her admissions that she WAS A MARRIED WOMAN were admitted against both of the defendants. The court reversed the judgment against the other defendant saying:

"The prosecution was therefore required to prove

that the woman with whom the adulterous intercourse was had was married to another man. Her confessions of this fact was evidence against herself; but her admissions were very clearly not evidence against another person. They were not upon oath, and the defendant Thompson had no opportunity to cross-examine her upon them."

And again:

"But the admission of another person, though charged with a crime in the same indictment, is not made competent, and it would be contrary to the elementary principles of justice to allow it."

And again:

"The fact that the man and woman are charged with a joint offense, and in the same indictment, does not give to either the power to affect the other by a confession of any material part of the charge."

So in the very well considered case of Reeves vs. State cited from the 6 Wymg. 240, 44 Pac. 62, the defendant was charged with perjury in testifying that an assault was not committed by one Chandler and for the purpose of proving that Chandler had committed an assault, and that defendant's statement that he had not, was untrue, the admissions of said Chandler and also his conduct in fleeing from arrest were offered in evidence, but the court held that the admission of the testimony was error, saying:

"Chandler's guilt, if it is to be considered as an incriminating circumstance against Reavis, must be established, in the same way that all other facts are to be

established against the plaintiff in error, by the testimony of witnesses testifying from their own knowledge, and not by the declarations of Chandler, made to others, that he himself was the guilty party, in the absence of the defendant, and after the affair had terminated."

And again as to the flight:

"The same objections are pertinent to the evidence relating to Chandler's flight the day after the assault, and his exclamations after he had retired at the ranch of a witness."

Of course it was very important and entirely proper for the prosecution to show by competent evidence that Watson had spent a greater portion of his time away from the land in question, but that must be done by competent evidence either by calling Watson, and taking his testimony as to the fact subject to cross-examination by the defendant, or by calling other witnesses who knew of his absence from the land, it could not be done by mere hearsay statements of Watson, simply because he happened to be the claimant.

So the testimony of Shepard along the same line (printed record page 83 to 88, was still more prejudicial to the defendant, because this testimony must have been offered for the purpose of directly besmirching the defendant and of raising the intimation that he, with others, was implicated with the claimant in horse stealing, and had hired him to run off horses.

The testimony was deliberately put in the record by the District Attorney over the repeated objections of the defendant and held there after its scope was entirely apparent over the motion of the defendant to strike it out. This testimony (after testifying to a conversation of Watson in the absence of the defendant) was as follows:

Q. What was the fact about their saying anything at that time about the ranch?

Same objection, as incometent, not in any way bearing upon the defendant and hearsay. Objection overruled and defendant excepted.

Whereupon the witness answered, he said he wanted to go back and prove up.

Q. Did he say why?

Same objection, ruling and exception.

A. He said parties wanted him to go back and prove up.

Q. Did he say why?

Same objection, ruling and exception.

A. He said parties wanted him to go back.

Q. Whom did he say wanted him to go back?

Same objection, ruling and exception.

A. He had reference to Mr. Hendricks.

Q. And did he give you any reason as to why he would not go back?

Same ruling to objection and exception.

A. He did not think the people wanted him, I guess.

Q. Didn't he tell you why?

Same objection, ruling and exception.

A. No, he didn't tell me exactly.

Q. Did he give you any reason why?

Same objection, ruling and exception.

A. Well, all the reason was that there were some horses run off that spring and he was hired to do it and he didn't suppose the settlers wanted him to go back.

Whereupon the counsel for defendant moved to strike out the conversation between the witness and Watson on the ground that the testimony is incompetent and hearsay against this defendant.

Whereupon the Court asked, "The conver-s-tion was all with Watson?" A. Yes, sir.

The COURT.—Its revelancy may be as to the bearing on the question of residence upon the claim by Watson.

Whereupon the Court ruled that for that purpose it was competent and the defendant excepted and the exception was allowed.

There was absolutely no purpose in this testimony except to introduce before the jury

the intimation that the people up there, and presumably among them this defendant, had hired the witness to steal horses and that he was afraid to go back into the country on that account, although they wanted him to do so. If this sort of thing can be overlooked in a criminal case, then it seems that there is no length to which the prosecutor cannot safely go in a case of this kind without danger of reversal.

THE ADMISSION OF EVIDENCE OF OTHER ALLEGED PERJURIES NOT IN ANYWAY CONNECTED WITH THE ONE CHARGED IN THE INDICTMENT AND NOT TENDING IN ANYWAY TO SHOW KNOWLEDGE, DESIGN OR SYSTEM.

The defendant was charged with perjury as a witness to the final proof of Charles A. Watson on the 23d day of June, 1904, and the prosecution was permitted over the objection of the defendant to show AS A SIMILAR ACT that the defendant had on September , 1904 ——THREE MONTHS AFTER THE WATSON PROOF——been a witness for another party in relation to an entirely different claim, not shown to have been in any way connected

with the one forming the basis of this indictment, and then the prosecution was permitted over the further objection of the defendant to offer still further testimony tending to show at great length that some of the statements in the latter proof *were false.*

It is true that this court has gone a long way in recent cases in admitting testimony of collateral matters of this kind, but it is submitted to the court that it has never gone so far as this and that there must be some limit to the introduction of this kind of proof and that the testimony in this case is clearly over and beyond any possible extension of the rule.

Boyd vs. United States, 142 U. S. 450.
People vs. Sharp, 107 N. Y. 427.
People vs. Molineaux, N. Y. 61 N. E. 286.
Comm vs. Jackson, 132 Mass. 16.
Shaffer vs. Comm, 72 Pa. St. 65.
Unsell vs. State, 39 Tex. 330; 45 S. W. 1022.
Walker's Case, First Leigh Va. 574.
State vs. Godfreson, 24 Wash. 398; 65 Pac. 523.
Schazer vs. State, 36 Wis. 429.
People vs. Tucker, 104 Cal. 440; 38 Pac. 195.
McGee vs. State, Miss. 22 So. 890.
State vs. Spray, Mo. 74 S. W. 846.
Leonard vs. State, 60 N. J. Law, 8; 41 Atl. 561.
Cobble vs. State, 31 Ohio St. 100.
Ivan vs. Comm, 104 Pa. St. 218.
Long vs. State, Tex. 47 S. W. 363.

State vs. Raymond, 53 N. J. L. 260.
People vs. Fitzgerald, 156 N.J. 253; 50 N.E. 846.
State vs. Graham, 121 N. C. 623; 28 S. E. 409.
People vs. Bowen, 49 Cal. 654.
State vs. Walthers, 45 Iowa 389.
State vs. Stevens, 56 Kans. 720; 44 Pac. 992.
McAllister vs. State, 112 Wis. 496; 88 N. W. 212.

Here, the testimony could not possibly have been admissible for the purpose of showing knowledge or design at the time of the alleged perjurs for the collateral act offered was *three months subsequent* to the time charged in the indictment.

Neither was there a particle of testimony tending to show that the two alleged offenses were connected in any way or that they were a part of any system on the part of the defendant. Indeed it was not even claimed that there was any such system on the part of the defendant, but the testimony was offered simply as a "*similar act*," (statement of Mr. Bristol, printed transcript page 99 and 152-3.)

It is true that the court seems to have had the "knowledge, design system" exception to the general rule in its mind, but as we have seen there was nothing in the world to

substantiate it in this case, and it surely cannot be true that in ALL cases testimony or other similar acts are admissible under this exception. If so, the general rule is entirely destroyed and the exception has become the rule.

That seems to have been the idea of the Court below but it seems unbelieveable that this court will go so far. Surely there must be some relation shown between the two offenses—something more than the fact that they belong to the same class of crimes before the collateral accusations can be dragged in to prejudice the defendant; where as we have said there was not even a claim on the part of the prosecution of anything more than that the offenses were similar. It was clearly offered upon the theory that where a party is charged with one crime the fact that he afterwards committed a similar crime or a crime of the same character tends to increase the probability of his guilt, and this is exactly what the Supreme Court of the United States, the Supreme Court of New York and the Courts of many other states have said could not be done in the cases cited above. See also Wigmore Vol. 1, Sec. 194 P. 233 and authorities cited.

It was contended that the claimant (Morgan) in the collateral case offered in evidence had made some sort of an arrangement with the Butte Creek Land, Live Stock & Lumber Com-

pany for the sale of the claim to them, (there was no such charge in the indictment in this case) but even if there was such an agreement, there was nothing to show that the defendant knew anything about it. He was not a stockholder nor a member of the company, nor in any way interested therein. (Printed Transcript page 104) and as to the compliance with law in the matter of improvements, and cultivation in the Morgan case, there was great room for question as to whether or not the law had been sufficiently complied with.

Nevertheless the defendant was either compelled to suffer the imputation before the jury of being guilty of perjury in this other matter or else he was compelled to go into an elaborate defense involving the whole question of whether or not Morgan had complied with the law and what his defendant's knowledge and belief were in relation to that question. In other words to try out at length not only the charge in the indictment, but the question of whether or not he had been guilty of some other offense entirely distinct from it, and of which charge he had no notice prior to the actual occurrence of the trial.

Whether innocent or guilty of the subsequent collateral charge, it could not but clearly prejudice him in the minds of the jury upon the trial of the charge upon which he was indicted. The evil of admitting such testimony cannot be more forcibly presented than it is in the opinion of Mr. Justice Harlan in the Ryan case:

"No notice was given by the indictment of the purpose of the government to introduce proof of them.

They afforded no legal presumption of inference as to the particular crime charged. Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. PROOF OF TEHM ONLY TENDED TO PREJUDICE THE DEFENDANTS WITH THE JURORS, TO DRAW THEIR MINDS AWAY FROM THE REAL ISSUE." * * * * * *

"However depraved in character and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence and only for the offense charged."

And by Mr. Justice Peckham, now of the United States Supreme Court in People versus Sharpe:

"It seems to me this is nothing more than an attempt to show that the prisoner was capable of committing the crime alleged in the indictment because he had been willing to commit a similar crime long before, at another place, and for the purpose of accomplishing the commission of another act by a different person. TO ADOPT SO BROAD A GROUND FOR THE PURPOSE OF LETTING IN EVIDENCE OF THE COMMISSION OF ANOTHER CRIME IS, I THINK, OF A VERY DANGEROUS TENDENCY. It tends necessarily and directly to load the prisoner down with separate and distinct charges of past crime, which it cannot be supposed he is or will be in proper condition to meet or explain, and which necessarily tends to very gravely prejudice him in the minds of the jury upon the question of his guilt or innocence."

Devens, J., in Com. vs. Jackson, 132 Mass. 20: "The objections to the admission of evidence as to oth-

er transactions, whether amounting to indictable crimes or not, are very apparent. Such evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it; and by showing the defendant to have been a knave on other occasions, creates a prejudice which may cause injustice to be done him."

Allen, J., in Coleman vs. State, 55 N. Y., 70: "A person cannot be convicted of one offense upon proof that he committed another, however persuasive in a moral point of view such evidence may be. It would be easier to believe a person guilty of one crime if it was known that he had committed another of a similar character, or indeed of any character. But the injustice of such a rule in courts of justice is apparent. It would lead to convictions upon the particular charge made by proof of other acts in no way connected with it, and to uniting evidence of several offenses to produce conviction of a single one."

Thayer, J., in State vs. Saunders, 14 Ore., 309: "Place a person on trial upon a criminal charge, and allow the prosecution to show by him that he has before been implicated in similar affairs—no matter what explanation of them he attempts to make—it will be more damaging evidence against him and conduce more to his conviction than direct testimony of his guilt in the particular case. Every lawyer who has had any particular experience in criminal trials knows this: knows that juries are inclined to act from impulse, and to convict parties accused upon general principles. An ordinary juror is not liable to care about such a party's guilt or innocence in the particular case, if they think him a scapegrace or vagabond. That is human nature. The judge might demurely and dignifiedly tell them that they must disregard the evidence, except so far as

it tended to impeach the testimony of the party; but what good would that do? And it is not at all improbable that he himself would imbibe some of the prejudice which proof of the character referred to is liable to engender."

Hayne, C., in People vs. Dye, 75 Cal. 112, 16 Pac., 537: "In a case which is at all doubtful, such a course would be almost certain to produce a conviction for an average jury. It is contrary to the first principles of justice to try a man for one crime and convict him of that because he may be guilty of another, or because he may be a low specimen of humanity."

Holt, L. C. J., in Harrison's Trial, 13 How. St. Tr. 833, 864, 874 (charge of murder; a witness was called to speak of some felonious conduct of the defendant three years before): "Hold, hold, what are you doing now? Are you going to arraign his whole life? How can he defend himself from charges of which he has no notice? And how many issues are to be raised to perplex me and the jury? Away, away! That ought not to be; that is nothing to the matter."

It may be right to punish criminals—to be zealous and vindictive in running them down—even in the spirit of the old Mosaic Law, "an eye for an eye, and a tooth for a tooth," but in our zeal in this behalf it is surely not well to forego or forget the principles and safeguards which protect the innocent, and the presumption that every man is innocent, and that his trial is to be had upon that theory.

The record in regard to this matter is presented in the printed transcript on page 87 to page 100 and in the amendments to the bill of exceptions page 152 to 154 and is as follows:

"And be it further remembered, that during the trial of said cause and as a part of the direct case of the Government, one John Morgan was called by the Government as a witness, who testified that he had lived in Wheeler county and that he took up a claim in that county.

"Whereupon he was shown what purported to be his final proof paper upon said claim."

Here the prosecution showed the witness the final proof in the claim of the said John M. Morgan, which appears on page 88 to page 99 of the printed transcript, and which included the corroboratory affidavit of the defendant Barnard showing residence and cultivation.

And said witness testified that the said paper bore his signature, that he did not know when he signed it, but that he knew what it was and that it was his proof on his homestead, the one he had taken up.

Whereupon he was asked the following question:

Q. Whereabouts?

To which the defendant objected as immaterial and incompetent.

COURT.—What is the purpose?

Mr. BRISTOL.— The purpose of this, if your Honor pleases, is to show—and the government proposes to follow it with proof offered for the purpose of showing—a similar act on the part of the defendant,

Coe Barnard. We offer to prove by this witness that this witness took a homestead and made proof and that Coe D. Barnard was his witness, and that the witness—(Here counsel was interrupted by)

Mr. BENNETT.—I think if you are going to make a statement of this kind you should make it in writing.

COURT.—Go ahead. It is perfectly proper.

To which defendant excepted.

Mr. BRISTOL.—And that at this particular time when this witness proved up, the defendant, Coe D. Barnard, was one of his witnesses and swore to his proof, and we will follow that by showing that at that time this witness did not reside, and never had resided, on that claim—as a similar act.

COURT.—Now make your objection. It is competent testimony.

Mr. BENNETT.—We object to it as immaterial, incompetent, tending to prejudice the defendant, and in no way bearing upon any issue in this case.

COURT.—It is competent, provided it is anywhere near the time. If years elapsed, why it would not be. What time did he make his proof?

COURT.—It will be admitted. You may have your exception.

Mr. BENNETT.—Take an exception, your Honor, and let it go to all this line of proof.

Whereupon the question was asked of said witness.

Q. What is the fact, Mr. Morgan, as to who your witnesses were at the time you made this purported proof?

Same objection, and that it was not the best evidence, whereupon the Court ruled that the best evidence was the paper itself, whereupon the paper purporting to be said final proof was offered by the Government (said paper hereinbefore set forth), for the same purpose as hereinbefore set forth, to which the defendant objected as immaterial and incompetent and tending to drag in other issues prejudicial to the defendant and not connected in any way with the charge against the defendant.

But the objection was everruled and the defendant excepted, and his exception was allowed, and said document was thereupon received in evidence and marked Government's Exhibit "A."

Whereupon the witness was asked the following question by the Government:

Q. Now, as to the homestead, Mr. Morgan, that is covered by Government's Exhibit "A," which you have identified, tell the Court and jury as to what is the fact as to whether or not you ever established an actual residence upon it, ever cultivated it or actually continued to reside upon it for the period set forth in this proof?

To which there was the same objection, ruling and exception and the witness answered:

A. No, I didn't live on it—I did not cultivate it.

We submit again that the obvious and only purpose of the admission of this testimony was to drag in a collateral matter, put the defendant on his defense as to it, and if possible,

blacken him by showing that he had committed some other crime than the one charged, and that therefore he was a person likely to have committed the crime charged in the indictment, because he had at another time, as said by the learned district attorney, "COMMITTED A SIMILAR OFFENSE."

As was said by the Supreme Court of New York in the Sharpe case, it is a mere subterfuge to attempt to put this on the ground of proof of knowledge, design, or system, in a case of this kind, because there was no attempt to show any system, whatever, or anything more than these two isolated and disconnected acts, and as we have seen, it could not possibly show knowledge or design, because it was long subsequent to the alleged perjury complained of in the indictment. Surely you cannot prove knowledge and design at a given time, by disconnected, though similar, acts done months afterward.

THE RULING OF THE COURT PERMITTING THE PROSECUTION TO CROSS EXAMINE THE CHARACTER WITNESS OF THE DEFENDANT AS TO PARTICULAR ACTS OF ALLEGED WRONG DOING IN NO WAY DISCLOSED OR ALLUDED TO IN DIRECT EXAMINATION.

The defendant called as a witness to his character one James Stewart who testified in substance that he knew the general reputation of the defendant in the community in which he lived as to truth and veracity, and that his reputation in that regard was good.

On cross-examination of the witness the prosecution was permitted to ask the witness as to *his own knowledge* of said alleged acts and declarations of the defendant which were claimed to have been untruthful—i e— if the defnedant had not come before him as a United States commissioner and made false statements as to

his residence on a homestead claim upon which he was making final proof.

This was offered by the District Attorney as bearing upon the reputation of Coe D. Barnard for truth and veracity and indirectly as impeaching the statement of the witness Stewart that Barnard's GENERAL REPUTATION in the community had been good.

On the direct examination of the witness he had been confined entirely to the matter of general reputation.

It is submitted to the court that it was error for the court below to permit the prosecuting attorney to cross examine a character witness thus.

Moulton vs. State, 88 Ala. 116-120; S. C. So. 758.

Gordon vs. State, 3 Iowa 415.

Kearney vs. State, 68 Miss. 233; S. C. 8 So. 292.

Olive vs. State, 11 Neb. 1-27; S. C. 7 N. W. 444.

Patterson vs. State, 41 Neb. 538; S. C. 59 N. W. 917.

State vs. Bullard, 100 N. C. 486; 6 S. E. 191.

Tessie vs. Huntington, 23 Howard (U. S. Supreme Court) 2; S. C. 16 Co. Op. Law, Ed. 483.

Commonwealth vs. O'Brien, 119 Mass. 345.

In all of the first six of the casee cited above, the question arose exactly as in this case —upon cross examination—and in each case the lower court was reversed for the admission of such testimony.

In Moulton vs. State, cited above the Court says:

"And a witness to character cannot speak of particular acts, or even the course of conduct of the person inquired about, but is confined to a statement of general reputation in the neighborhood in which he lives. The rule applies with equal force to original and rebutting testimony. The issue is good or bad repute, and to this each party is confined. Similarly, the cross-examination of a character witness must be conducted within the limits of this inquiry." * * * *

"But this court has never held that it was proper, even on cross examination, to elicit the witness' knowledge of the conduct or of particular acts of a defendant, or other person whose character is involved in the issue; but, on the contrary, its expressions are in perfect harmony with all the text-writers who touch on the point, and with an unbroken line of cases adjudged by courts of last resort, and which are uniform to the effect that such evidence is incompetent and inadmissible. * *

"The purpose of the inquiry being to ascertain the general credit which a man has obtained in public opinion,—whether justly or unjustly, is not the question:—the evil and injustice of opening a Pandora's box of specific indictments, of which he had no opportunity to answer, would be just as great as on cross examination as on the examination in chief. The objection goes to the nature of the evidence, and not to the time or mode of its introduction."

And in Gordon vs. State, the Court says:

"It only remains to inquire whether it was correct to permit the state on cross examination of a witness who was called as to the good character of the defendant, to go into proof of particular acts or difficulties on his part? And in permitting this we think the court erred. * * * * * *

But the examination must be confined simply to the general character or reputation, and neither can ask questions as to particular facts or difficulties."

And the Supreme Court of the United States in Tessie vs. Huntington, says:

"He is not required to speak from his own knowledge of the acts and transactions from which the character or reputation of the witness had been derived, nor, indeed, is he allowed to do so, but he must speak of his own knowledge of what is generally said of him by those among whom he resides, and with whom he is chiefly conversant; and any question that does not call for such knowledge is an improper one, and ought to be rejected."

And the text books are to the same effect. Mr. Greenleaf says, Vol. 1, 14th Edition; page 558:

"BUT IN IMPEACHING THE CREDIT of a witness, the examination must be confined to his general reputation, and not be permitted as to particular facts; for every man is supposed to be capable of supporting the one, but it is not likely that he should be prepared to answer the other without notice."

Rapalje in his work on the Law of Witnesses, page 329, says:

"But the inquiry must be confined to the general reputation of the witness; particular facts, which, if true, would impeach his character for veracity, cannot be gone into; and the reason is that every man may be supposed capable of supporting his general character, but it is not likely that he should be prepared to answer to particular facts, without notice; and unless his general character and behavior are in issue, he has no notice."

Wigmore, speaking particularly of Cross-examination, says, in Vol. 2, page 1144:

"It is to be noted that the inquiry is always directed to the witness' hearing *of the disparaging rumor* as negativing the reputation. There must be no question as to the *fact of the misconduct*, or the rule against particular facts would be violated; and it is this distinction that the Courts are constantly obliged to enforce." (Italics above are those of the author.)

We call especial attention of the court to this matter because it seems to us so plain as to be one of those things which cannot be overlooked or avoided and upon it alone, if there were no other question in the case, it seems to us the learned District Attorney could not avoid a reversal. The record so far as it is material to this matter is as follows:

And be it further remembered, that after the Gov-

ernment had rested its case, JAMES STEWART was called as a witness in behalf of the defendant and testified as follows:

DIRECT EXAMINATION.

(Testimony of James Stewart.)

Q. You have already been sworn?
A. Yes, sir.

Q. You were a witness for the Government here?
A. Yes, sir.

Q. How long have you lived in the Fossil country?
A. Sixteen years.

Q. Are you acquainted with Coe Barnard?
A. Yes, sir.

Q. How long have you known Coe?
A. I have known him for a long time.

Q. Do you know what his general reputation in the community has been for truth and varacity?
A. I do.

Q. What has it been, good or bad?
A. It has been good.

CROSS-EXAMINATION.

Q. Do you know where Barnard has lived during all this time? A. Yes, sir.

Q. Where? A. In that Fossil neighborhood.

Q. What do you mean by the Fossil neighborhood, describe it more particularly to the jury?
A. Part of the time in town and part of it on his ranch.

Q. Whereabouts is that ranch?

A. A few miles west from Fossil.

(Testimony of James Stewart.)

Q. How many?

A. About three, I should think; I am not sure about it.

Q. Is that down, the place you mean down next place known as the J. M. Barnard place on Butte Creek? A. I could not say as to that.

Q. How do you fix the place where Barnard lived? Do you know the section, township and range Mrs. Barnard pointed out as the northwest quarter of section 25, township 6 south, range 20 east?

A. I would not be sure about the section.

Q. Could you tell by looking at the map whether that was the place he lived at?

A. All I know of where he lived at is I have been down to the Barnard place about two times in my life.

Q. How many times? A. Two times.

Q. Do you know how to get there?

A. Down Butte Creek.

Q. Down Butte Creek all the way?

A. You could leave the road a little, sir.

Q. Where did you strike Barnard's place?

A. It is right on the creek.

* * * * *

Mr. BRISTOL.—Can we agree on where the Barnard place is on the map?

Q. Can you state whether or not it was in township 6 south range 20 east, on Butte Creek?

A. I am pretty sure it is there.

* * * * * *

Q. How long have you known Mr. Barnard?

A. Sixteen years.

Q. And during that time where did he live?

(Testimony of James Stewart.)

A. He lived either in Fossil or down Butte Creek.

Q. Either in Fossil or down Butte Creek?
A. Yes, Sir.

Q. I show you a paper and ask you to look at it and state whether you have ever seen it before?
A. Yes, sir.

Q. What is it?
A. It is Coe Barnard's final proof.

Q. For what? A. For his homestead.

Q. For what homestead?
A. The homestead he proved up on before me.

Q. Well, what homestead do you know?
A. The homestead described here (referring to final proof.)

Q. What homestead?
Objected to as incompetent, immaterial, not proper cross-examination. This witness was called simply as to the question as to the character of Mr. Barnard. Now, I do not see upon what theory of cross-examination they can put a paper of this kind into his hands and proceed to examine him about it and cross-examine upon that point.

COURT.—What is the purpose of this cross-examination.?

Mr. BRISTOL.—I propose to show by this witness matter affecting the reputation for truth and veracity of the defendant Coe Barnard. Nothing more, nothing less.

COURT.—Can you show it by a specific instance?

Mr. BRISTOL.—I can, your Honor. I propose to show by this witness that Coe D. Barnard, at a time before this witness as United Stated Commissioner,

swore to the fact that he had continuously resided upon a place as a homestead other than the place fixed as his place.

COURT.—I am not asking you the specific instance. I am asking you whether you can assail reputation by specific instance or whether your questions must not be confined to a general reputation?

Mr. BRISTOL.—I think, with respect to that, that generally it is confined where the matter is thought to be general without regard to any specific act, but the question in this case is this: The witness testifies generally to reputation for truth and veracity. Now, if he knows an instance or instances affecting that matter, that is, the matter concerning that part witness answered at about the same time and which entered into his estimate of the truth and veracity of the person inquired about, it would seem then to be competent, but I do not claim that you can introduce specific instances against general reputation for truth and veracity.

COURT.—That is all you can ask as to general reputation. I don't know what the best modern authority is with respect to this. There is a good deal to be said on both sides.

Mr. BRISTOL.—The Government does not wish to insist upon it if the Court feels that it is incompetent.

COURT.—You may go ahead, Mr. Bristol. Just pass this point and between now and two o'clock you can see what you want to do.

* * * * * *

The witness Stewart thereupon resumed the stand, and the Court overruled the objection to the question under consideration, to which ruling the defendant excepted.

The following question was then asked the witness:

What is the fact, Mr. Stewart, as to whether or

not you have heard or know whether Coe D. Barnard, on or about the 23d day of June, 1904, before you as United States Commissioner, gave any testimony under oath then in a matter before you?

Mr. BENNETT.—Now, we object to that part of it in which the witness is asked to state what he may know of his own knowledge.

Mr. BRISTOL.—I said "heard or know," Judge.

Mr. BENNETT.—Well, I don't object to the "heard" part of it, but what he knows, that I object to as incompetent and not proper cross-examination.

COURT.—Now, let that go over the Judge's objection and note his exception. I understand all this testimony will be objected and the exception preserved.

The witness was then shown a paper and stated that that contained the matter to which he referred and which occurred before him as a Commissioner. The witness was then handed the paper and asked to look at it and state if he knew whose signature was upon it, and he answered that it was Mr. Barnard's and that it bore his official signature as a United States Commissioner.

Mr. BRISTOL—The Government proposes to offer that part of the paper, in connection with the cross-examination of the witness, concerning the homestead proof, testimony of claimant, identified by the witness as that of Coe D. Barnard.

Objected to as incompetent, immaterial and not proper cross-examination.

Objection overruled. Exception allowed.

The paper is marked Government's Exhibit "9-A," and read in evidence. * * * * *

REDIRECT EXAMINATION.

Q. Mr. Stewart, do you know anything about how much Coe Barnard lived on his homestead claim, that he proved up on before you?

A. Nothing except what he swore to in his proof.

Q. You don't know anything about that at all?

A. No; I know absolutely nothing about it.

Q. Do you know anything about how many improvements he had on the place? A. No, sir.

Q. Do you know anything abont whether or not his family resided on the place?

A. I do not, any more than what he swore to in his proof.

Q. Do you know anything as to whether the statements made in his proof were true or false?

A. I do not.

Mr. BENNETT.—Now, your Honor, we move to strike out the final proof upon the ground that it is immaterial and incompetent, and improper cross-examination, and its only purpose can be put the defendant on trial and compel him to explain a matter which has nothing whatever to do with this case.

COURT.—Whose proof was that, that this witness testified to?

Mr. BRISTOL.—That was the proof of Coe D. Barnard, the defendant.

COURT.—On his own place?

A. Yes, sir, his own place.

Mr. BRISTOL.—On a place that he at that time was proving up on, there being evidence already it the record, offered by the defendant's witnesses in that same connection, that the family, including the defendant Barnard, never lived anywhere else than upon the home

place of Barnard's on Butte Creek during the entire period from somewhere in the neighborhood of 1898.

Motion overruled. Defendant excepts.

Record P. 105 to 110 and amendments P. 175 to 183.

It is perfectly clear then that this testimony was offered and admitted upon the theory that you could impeach the testimony of the witness Stewart and indirectly the reputation of the defendant as a truthful man by particular acts.

There are some other questions raised by the record in relation to instructions, etc,, but we have concluded to submit this case entirely upon the questions already presented.

Respectfully submitted

BENNETT & SINNOTT,

Attorneys for Plaintiff in Error.

No. 1499

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COE D. BARNARD

PLAINTIFF IN ERROR

VS.

THE UNITED STATES OF AMERICA

DEFENDANT IN ERROR

Brief for Defendant in Error

Upon Writ of Error to the United States Circuit Court for the District of Oregon

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For the District of Oregon

COE D. BARNARD,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Brief for Defendant in Error

Upon Writ of Error to the United States Circuit Court for the District of Oregon.

HISTORY OF THE CASE

The plaintiff in error, who will hereinafter be called "the defendant," was indicted by the Grand Jury of the Circuit Court for the District of Oregon on the 8th day of April, 1905, for the crime of perjury in having wilfully, corruptly and falsely deposed and sworn before James S. Stewart, a United States Commissioner for the District of Oregon, to certain testimony constituting part of the final proof in support of a homestead entry of one Charles A. Watson. The materiality of the testimony is duly alleged and the testimony itself is set forth in full in the indictment.

(Trans. of Rec., pages 8 to 16.)

On the 12th of April, 1905, the defendant filed a plea in abatement (Trans. of Rec., pages 18 to 24). It was stipulated that certain objections which had been theretofore filed in another case be deemed and treated as offered in support of the objections to the plea in abatement in this case, and that the same proceedings, rulings, objections and exceptions that were made and had before the Court in said case, etc., be deemed, considered and treated as having occurred upon the hearing of the plea in abatement in this case.

(Trans. of Rec., pp. 25 and 26.)

This plea in abatement was overruled, and as no specification of error has been made or argued in reference to this plea it will hereafter be disregarded.

On April 27, 1905, the defendant demurred to the indictment on the ground:

"That said indictment and the matter and facts stated "therein in manner and form as the same are so stated "and set forth in the indictment, are not sufficient in law, "and that the facts stated in said indictment are not suf- "ficient to constitute a crime."

(Trans. of Rec., p. 27.)

Thereafter, on the 10th day of July, 1905, at a term of said Circuit Court presided over by Hon. John J. De-Haven, United States District Judge, this demurrer was overruled.

(Trans. of Rec., page 32.)

On September 28, 1905, the defendant entered his plea of not guilty to the indictment.

(Trans. of Rec., page 33.)

Thereafter, beginning on August 8, 1906, at a term of said Circuit Court presided over by the Hon. William H. Hunt, United States District Judge, the trial of the defendant upon said indictment was begun and a jury empaneled, and such further proceedings had that on the 11th day of August, 1906, the defendant was found guilty of the crime charged in the indictment, with a recommendation to the clemency of the Court, and on the 18th day of August, a motion in arrest of judgment having been made and argued by counsel and having been denied, the defendant was sentenced to imprisonment at hard labor at the United States penitentiary at McNeil's Island, Washington, and to pay a fine of $2,000.00.

(Trans. of Rec., pages 35 to 43.)

Thereafter, and on the 15th day of February, 1907, the defendant filed a petition for writ of error, with the usual supersedeas bond, and an order was entered allowing said writ.

(Trans. of Rec., pages 44 to 78.)

Thereafter, and on May 3, 1907, the bill of exceptions which constitutes the record in this case was duly made, settled and filed.

It will be noted that this bill of exceptions not only does not purport to contain and set forth all of the evidence given on behalf of the government on the trial, but at page 175 it contains this specific statement:

"There was other testimony given by the witnesses "Coombs, Scoggin, King, Parker and Kennedy, tending "to corroborate the other witnesses for the Government "and tending to show the facts stated in the indictment."

The allegations or assignments of error, and points raised and argued by counsel for the defendant in error, will now be considered *seriatim*.

ARGUMENT

POINT I.

The demurrer to the indictment was properly overruled.

The claim of the demurrer, and of the argument of counsel for plaintiff in error in support of it, seems to be, that the United States Commissioner before whom the testimony of Barnard which was alleged to be perjured testimony was taken, was not specifically alleged in the indictment to have had authority to administer "that particular oath" or take "that particular proof" at the time it was taken, and that it was not, in the alternative of this, alleged in the indictment that there were certain preliminary facts which would give the Commissioner authority to take that particular proof and to show that the testimony in question was material to the proof.

(See Brief of Plaintiff in Error, page 18 et seq.)

The point of the argument made in this behalf is embodied in the statement at pages 21 and 22 of the Brief for Plaintiff in Error, that:

"It will be found by an examination of the authorities "that it is usual to allege directly that the officer had "authority to 'administer said oath,' but here there was "no such allegation as is required at common law, show-"ing that the steps had been taken to give such authority.

"It is perfectly clear under the authorities that one "of these two methods must be followed, and the pleader "must either follow the statute and allege directly that "the officer had authority to administer the particular

"oath in question, or the alternative common law pro-
"ceeding and allege (in such cases as this) that the proper
"notice had been given, posted, etc., and the preliminary
"requirements attended to, which would give the commis-
"sioner authority to so administer the oath."

Citing,

2 Bishop's New Cr. Pro., Sec. 901 and 914.

Wharton's Cr. Law (8th ed.), Sec. 1290-91.

The counsel admit, for such is the case, that the indictment contains a general allegation that the Commissioner was an officer authorized by law to administer such oaths, but contends that that was a mere allegation of general authority and that, inasmuch as the final proofs to a homestead entry could not be made until certain notices had been filed and published, the indictment should have contained an allegation, either that the United States Commissioner was duly authorized to administer "this particular oath," or that the notices, etc., had been published.

Turning now to the indictment, we find that it contains the following allegation as to the authority of the Commissioner:

"That on the twenty-third day of June, in the year of
"our Lord nineteen hundred and four, Coe D. Barnard,
"late of the County of Wheeler, in the State and District
"of Oregon, at and within the said County of Wheeler,
"in the district aforesaid, came in person before James
"S. Stewart, who was then and there the duly appointed,
"qualified and acting United States Commissioner for the
"District of Oregon, and who was then and there an
"officer, who was authorized by the laws of the United

"States to administer an oath and to take the testimony "of witnesses in the matter of the application of a claim- "ant to make final proof upon a homestead entry of public "lands of the United States lying within The Dalles land "district of the United States in the said District of Ore- "gon, and that the said James S. Stewart, as such United "States Commissioner for the District of Oregon, was "then and there engaged in taking and hearing testimony "in the matter of the application of Charles A. Watson, "late of said District of Oregon, to make final proof in "support of his homestead entry for—"
certain lands, describing them.

Then follow the proper allegations as to the administering of the oath, the materiality of the testimony and the testimony itself, which is set out in full, and concluding with the following allegation:

"And so the grand jurors aforesaid, upon their oath "aforesaid, do say that the said Coe D. Barnard, in man- "ner and form aforesaid, in and by his said testimony, "and upon his oath aforesaid, in a case in which the law "of the said United States authorized an oath to be "administered, unlawfully did wilfully, and contrary to "his said oath, state and subscribe material matters, which "he did not then believe to be true, and thereby did com- "mit wilful and corrupt perjury," etc.

(Indictment, Trans. of Rec., page 15.)

Counsel for plaintiff in error seem to have omitted or evaded calling the attention of the Court to this portion of the indictment just quoted. We insist that if there is any merit whatever deserving of consideration in the point made against the indictment by the demurrer it

is entirely overcome by the two allegations of the indictment which we have quoted, namely, first, the allegation of the general authority of the United States Commissioner "to administer an oath and to take the testimony "of witnesses in the matter of the application of a claim-"ant to make final proof upon a homestead entry of public "lands," etc., followed by the allegation that the said United States Commissioner "was then and there engaged "in taking and hearing testimony in the matter of the "application of Charles A. Watson, late of said District "of Oregon, to make final proof in support of his home-"stead entry," and closing with the allegation that this was a case "in which a law of the said United States "authorized an oath to be administered."

We assert that directly the converse of the proposition put forth by counsel for plaintiff in error is the true state of the law, both upon principle and upon authority. That is to say, where there is a general allegation of general authority conferred by law upon an officer to administer an oath it is never necessary to set out that he had particular authority to administer the particular oath in question, provided, of course, the indictment contains, as this one does, the allegations showing the pendency of the proceeding and materiality of the testimony in which the oath was taken.

Counsel for plaintiff in error do not cite any specific decisions of any courts, but the general enunciations of the well-known text books Wharton and Bishop, which on being examined will clearly disclose that these writers merely enunciate the well-known and general principle

that where an officer only gains the authority to administer an oath and take testimony in a special case by virtue of the particular facts of the case itself and has no general authority to administer oaths, in all such cases the particular fact should be set forth giving the jurisdiction and authority; which is very far from being the situation here. In the case at bar it is quite true that the applicant Watson, to whose final proof the plaintiff in error was giving support by his testimony, was not entitled to make such final proof and have his application allowed until the notices had been prepared and published in the manner required by the Act of March 3, 1879, Chapter 192, which is quoted in the brief for plaintiff in error at pages 19 and 20. But the indictment does contain an allegation that Commissioner Stewart was authorized to administer an oath and take the testimony of witnesses in the matter of the application of a claimant to make final proof and that he was engaged in taking and hearing testimony in the matter of the application of Watson to make final proof, and that Barnard subscribed and swore to his written testimony, which is set out in full, as true, and that such testimony was material, as the statute provides that such testimony shall be given in support of such application and before the application can be granted.

Further argument on this point seems unnecessary. It seems to fall precisely within the provisions of the U. S. Revised Statutes, section 1025, that after verdict no indictment shall be deemed insufficient for any defect which shall not tend to the prejudice of the defendant,

and the authorities construing and applying that section, some of which are:

Rev. St. U. S., Sec. 1025;
United States v. Rhoades, 30 Fed. 431, 434;
United States v. Chase, 27 Fed. 807;
Connors v. United States, 158 U. S. 408, 411;
Price v. United States, 165 U. S. 311, 315;
Wright v. United States, 108 Fed. 805, 810;
United States v. Dimmick, 112 Fed. 352, 354.

Whatever defects then exist not consisting in the *total want* of essential averments are cured after verdict; and if the indictment read in the light of ordinary understanding and intelligence apprises the defendant of the charge against him, it is sufficient.

Markham v. United States, 160 U. S. 319, at p. 325;
Lehman v. United States, 127 Fed., pp. 47 and 48;
Evans v. United States, 153 U. S. 584;
United States v. Eddy, 134 Fed. 114, 116, 117.

POINT II.

The objections and exception taken by the plaintiff in error to the admission of the evidence given by Putnam of the oral statements made by one Watson tending to show that Watson had not resided upon the land described in his homestead entry were not well taken.

The first ruling on this point is found at page 82 of the record. The question there put and objected to was as follows (testimony of E. A. Putnam):

"Q. State whether or not there was anything in that "conversation that showed or tended to show where Wat-

"son had been about that time or immediately preced-
"ing it?

"To which the defendant objected as incompetent and "not in any way binding upon the defendant in this cause "and as hearsay and as not the best evidence, but the "objection was overruled and the defendant excepted;

"The Court saying: 'It is understood the question is " 'admitted solely as bearing upon the question as to " 'whether or not Watson did state the truth in regard " 'to the answers that he made in making his proof.'

"Whereupon the witness answered, 'He said he had " 'his foot cut at the time—he said he had been working " 'on the Columbia River, down about St. Helens, some- " 'where, and said he was going home, and going out to " 'where his folks lived.'

"Q. Did he say where that was?

"Same objection, ruling and exception.

"A. Yes, sir; out towards Forest Grove, out in Wash- "ington County.

"Q. What was the logging camp, did he state?

"Same objection, ruling and exception.

"A. It was somewheres about St. Helens, somewhere "down about in there, I think it was."

It further appears in the record (page 83) that said Charles A. Watson had not been called or testified as a witness in said cause and did not testify as a witness therein. It also appeared that this conversation between the witness Putnam and the said Watson occurred at Portland, Oregon, at the Merchants Hotel, about the 28th of April, 1903.

(Trans. of Rec., page 81, and see expressly page 150, where exhibit date is given as April 28, 1903.

Watson was the man as to whose final proof in support of his homestead entry the plaintiff in error, Barnard, gave the testimony which constituted the perjury alleged in the indictment.

The argument on the part of the defendant is that this testimony of Putnam as to what Watson told him as to where he had been and what he had been doing and where he was going was purely hearsay evidence. In support of this argument the counsel for plaintiff in error cite cases in Wyoming, Ohio, Massachusetts, Mississippi, Nevada, Oregon, Alabama, California and Georgia, excerpts from some of which are printed in their brief, and which undoubtedly declare the well-known general rule that hearsay evidence to prove a fact is not admissible except when the testimony of the person whose statements are being proved cannot be obtained, such as, for instance, the cases specified by counsel for plaintiff in error at page 27 of the brief, viz: that the person in question was dead or out of the state.

None of these cases, however, as a very cursory examination will disclose, go so far as to exclude the declarations of a person as to his place of residence when that place of residence at a given time is one of the issues involved in the trial. Reasoning about this class of evidence from the standpoint of principle, it appears at once that as residence is partly a matter of actual occupancy and partly a matter of intention of the occupant of a particular place, his declarations are the very best kind of evidence as to his intentions. And when we come to examine the authorities we find that they follow this line of reasoning and that there is abundant authority to sus-

tain the evidence, concerning the admission of which error is claimed by the counsel for the plaintiff in error.

In

McDowell v. Goldsmith, 6 Md. Reports 329,

quoted and followed in

Curtis v. More, 20 Md. 93,

the Court said:

"Where it is necessary in the course of a cause to inquire into a particular act and the intention of the persons who did the act, proof of what the person said at the time of doing it is admissible for the purpose of showing its true character."

In

Shailer v. Bumstead, 99 Mass. 120,

which was cited with approval by the United States Circuit Court of Appeals for the Ninth Circuit in the case of

In re San Raphael, 141 Fed. 279,

more fully referred to below, the Circuit Court of Massachusetts said:

"Intention, purpose, mental peculiarity and conditions are mainly ascertainable through the medium offered by language. Statements and declarations, when the state of mind is the fact to be shown, are therefore received as mental acts or conduct."

So also in

Inhabitants of Knox v. Montville, 98 Maine 493,

the Supreme Court of Maine held, though carefully guarding the extent to which such declarations should be permitted, that declarations of a pauper as to his intentions concerning his residence were admissible.

In

Grisseza v. Terwilliger, 77 Pac. Rep. 1034,

a California case, the California Supreme Court held that the declarations of a person that he had no title or interest in an irrigation ditch was admissible to show that he had abandoned said ditch.

And in

Johnson v. Cole, 178 N. Y. 364,

and many kindred cases, the declarations of a person when delivering a certificate of deposit to another person were held admissible to show whether he was acting in his own behalf or as agent for his wife.

And see also

Wright v. Stewart, 130 Fed. 905, 915;

Brown v. United States, 142 Fed. 1;

Insurance Co. v. Moseley, 8 Wall (U. S.) 397.

And

Mutual Life Ins. Co. v. Hillman, 145 U. S. 285,

in which case the authorities bearing upon the admissibility of declarations showing intention and purpose are quite fully collated.

In the recent case of

In re San Raphael, 141 Fed. 271-279,

the United States Circuit Court of Appeals for the Ninth Circuit, in an opinion per Ross, J., quoted and followed the opinion of the Supreme Court of the United States in the case of Mutual Life Insurance Company v. Hillman as follows:

"Whenever the intention is of itself a distinct and "material fact in a chain of circumstances it may be proved "by the contemporaneous oral or written declarations of

"a party. The existence of a particular intention in a "certain person at a certain time being a material fact "to be proved, evidence that he expressed that intention "at that time is as direct evidence of the fact as his own "testimony that he had that intention would be."

And see also the authorities collected in Volume 20 of the Century Digest, title "Evidence," Sections 1063 and 1064.

On examination of the record in the case at bar it appears clearly that the declarations of the witness Putnam, and later of the witness Shephard, which were objected to, solely related and were strictly limited by the Court to proving what the intentions of Watson were as to his maintaining his residence on a certain place or going away from or going to another place. Thus at page 82 of the record, which we have quoted above, the witness Putnam was allowed to state that Watson told him when he saw him at Portland that he, Watson, "Had "his foot cut at the time—he said he had been working "on the Columbia River, down about St. Helens, some-"where, and said he was going home, and going out to "where his folks lived—out towards Forest Grove, out in "Washington County. It was somewheres about St. "Helens, somewhere down about in there, I think it was."

And later on the witness Shephard was allowed to testify that Watson told him that he, Watson, had run off some horses from up near where the land in question was and that the settlers up there did not want him to come back, or that in substance.

We respectfully submit that the testimony as to Watson's declarations was strictly proper and admissible, with

the limitations imposed upon it by the Court, solely for the purpose of showing by those declarations, as it had been theretofore shown by other evidence in the case (and it must be presumed by the Court to have been conclusively so shown because the record does not purport to contain all the evidence, and does contain the statement at page 175, quoted earlier in this brief, that there was other testimony "tending to corroborate the other wit-"nesses for the government and tending to show the facts "stated in the indictment"), that Watson in fact did not reside the necessary length of time required by law on his homestead entry land, and that both the affidavit of Watson as to such residence and the affidavit of the defendant Barnard as his witness to continuous residence from 1898 to 1904 were false. Therefore we conclude that no prejudicial error was committed by the admission of Putnam's evidence as to Watson's declarations.

POINT III.

The objection and exception taken by the plaintiff in error to the testimony of Shephard as to the declarations and statements of Watson as to his residence were not well taken.

This is so for the reason stated in the foregoing point. We make a separate point as to it here simply because some question is raised by counsel for plaintiff in error at pages 30 and 33 of their brief that the testimony of Shephard was offered not only for the purpose of proving Watson's declarations and intentions as to his residence, but also, as claimed, "for the purpose of directly besmirch-"ing the defendant and of raising the intimation that he, "with others, was implicated with the claimant in horse "stealing, and had hired him to run off horses."

The testimony of Shephard and the objections thereto and the rulings of the Court thereon appear at pages 83 and 84 of the Transcript of the Record. From this it appears that the witness saw Charles A. Watson around Mountaindale in 1902, that Watson was there about two weeks hauling timber in June or July, that it was after the third of July that he saw Watson working for one Hollenbeck, and that he saw Watson running a saloon at Greenville in 1901, seven or eight miles from Mountaindale, that he, the witness, landed there about the 21st of June with some horses and returned there about the 25th of July, that he saw Watson there about that time three or four times, pretty nearly every day he would go to Greenville with a horse and team, that Watson was running the saloon alone himself, and that he had talked with Watson at that time.

Whereupon the following question was asked him:

"Q. And did he state at that time, or in connection "with that same matter, while you were conversing, the "reason why he didn't go back to it?"

To this the defendant objected on the same grounds as to the testimony of Putnam, as hereinbefore stated, but the objection was overruled and the defendant excepted.

Whereupon the witness answered:

"Well, he asked me how it would be for him to go "back there, and I answered, if you are making a good "living here and trying to be honest you had better stay "where you are.

"Q. What was the rest of the conversation, if any?"

Same objection, ruling and exception.

"A. Well, it was about the horses he brought down. "I asked him what prices he got for them, and so on."

The Court will note that the first question which called for the conversations with Watson simply called for the statement which Watson had made to the witness Shephard as to why he did not go back to his homestead entry, and that the witness had simply stated that Watson asked him how it would be for him to go back there. The Court will also note that the next question, "What was the rest of the conversation, if any?" must necessarily have referred to this same conversation and to the same matter that was called for by the first question, which related solely as to what Watson stated as to his reason why he did not go back to his homestead entry. To this second question, "What was the rest of the conversation, if any?" the same objection was made as to the testimony given by Putnam as to the conversation with Watson, and if that testimony was proper it certainly was proper to ask the question of Shephard. It appears, however, that when Shephard answered the question he stated, "Well, it was "about the horses he brought down. I asked him what "prices he got for them, and so on." He was then asked, without objection:

"Q. Horses he had where?

"A. Horses he fetched down in 1901.

"Q. In 1901 or 1902? A. In 1899.

"Q. What horses were they?

"A. They were the horses he got of Mr. Barnard.

"Q. This same defendant? A. Yes, sir.

"Q. Just tell the jury about that, please.

"A. About the horses?

"Q. Yes; just what you know; not what anybody told "you; state the facts.

"A. Well, he was working for Barnard and got those "horses and brought them down here to sell; there were "seventeen head of them passed through the gate, going "down the hill to my brother's ranch.

"Q. When was that?

"A. July, about the 17th, in the year 1899. These "horses were at Mr. Barnard's at the time; I counted "them as they went by; I know they were Barnard's "horses because I had seen him riding around there break-"ing them, riding them around the range and gathering "up the horses—he fetched the horses to Greenville, at "least that is what he said; he might have sold some along "the road or traded them off for something.

"Q. Was there anything said in any of the conversa-"tions you had—did you converse with Watson about that "time?"

It will be observed, therefore, that defendant's counsel sat by and permitted the witness to answer the question as to what the rest of the conversation was, that it was about horses he brought down, and all the other questions as to where the horses came from and what he saw about them, without the slightest objection or intimation of any claim at that time that there was anything in this testimony about the horses that was objectionable, except the objection that he had made to the testimony of Putnam, which was a general objection to any testimony as to declarations of Watson as hearsay.

At page 86 of the record the question was asked:

"What was the fact about their saying anything at "that time about the ranch?"

To this objection was made as incompetent and not in any way bearing upon the defendant, and hearsay. The objection was overruled and the defendant excepted.

Whereupon the witness answered:

"He said he wanted to go back and prove up.

"Q. Did he say why?"

Same objection, ruling and exception.

"A. He said parties wanted him to go back and "prove up.

"Q. Did he say why?"

Same objection, ruling and exception.

"A. He said parties wanted him to go back.

"Q. Whom did he say wanted him to go back?"

Same objection, ruling and exception.

"A. He had reference to Mr. Hendricks.

"Q. Did he give you any reason as to why he would "not go back?"

Same objection, ruling and exception.

"A. He didn't think people wanted him, I guess.

"Q. Didn't he tell you why?"

Same objection, ruling and exception.

"A. No, he didn't tell me exactly.

"Q. Did he give you any reason why?"

Same objection, ruling and exception.

"A. Well, all the reason was that there were some "horses run off that spring and he was hired to do it and "he didn't suppose the settlers wanted him to go back."

Whereupon the counsel for the defendant moved to strike out the conversation on the ground that the testimony is incompetent and hearsay against this defendant.

Whereupon the Court asked the witness:

"The conversation was all with Watson?

"A. Yes, sir.

"THE COURT: Its relevancy may be as to the bearing "on the question of residence upon the claim by Watson."

Whereupon the Court ruled that for that purpose it was competent, and the defendant excepted and the exception was allowed.

We respectfully submit that the criticism made by counsel for plaintiff in error that there was anything in this testimony of Shephard that tended to besmirch the defendant and raise the intimation that he, with others, was implicated with the claimant Watson in horse stealing, and that he had hired him to run off horses, is wholly unfounded by the facts of the case as disclosed by the record. The testimony which related to Watson's declarations as to Barnard (the defendant) was clearly innocent of any such inference and simply tended to show that the claimant Watson had been bringing horses down which belonged to Barnard, and for all that appears, they were being brought down for perfectly legitimate purposes, at a certain time in June, 1901, which, according to the proofs sworn to by Watson and concerning which the defendant below, Barnard, gave testimony which is alleged to be perjured, was the time during which Barnard had testified that Watson had an established and continuous residence on the homestead in question.

Thus Question 5 in the homestead entry was as follows:

"When did claimant settle upon the homestead, and "at what date did he establish actual residence thereon?

"Ans. In the spring of 1898; established residence at "the same time.

"Ques. 6. Have claimant and family resided continu- "ously on the homestead since first establishing residence "thereon?

"Ans. Yes, except as stated below. He is unmarried. "I live about eight miles from settler's place. In riding "for my stock I frequently ride past his place and stop "at his house.

"Ques. 7. For what period or periods has the settler "been absent from the land since making settlement, and "for what purpose; and if temporarily absent, did claim- "ant's family reside upon and cultivate the land during "such absence?

"Ans. He made a trip to the Willamette Valley in "July, 1902, for the benefit of his health, and returned in "October, 1902."

Thus it appears that the defendant below had testified positively that Watson resided continuously on the homestead entry since 1898, excepting a trip to the Willamette Valley in July, 1902, for the benefit of his health. Consequently it was material and proper to show Watson's whereabouts and his actions at any time from 1898 down to the time homestead proof was made, viz., June 23, 1904.

The further testimony of the witness Shephard as to the reason which Watson gave why he did not want to go back had a proper tendency as bearing upon Watson's intention as to his residence. It is respectfully urged that if, as Watson told Shephard, "There were some "horses run off that spring (1901) and he was hired to "do it, and he didn't suppose the settlers wanted him to

"go back," these facts, or the statement of Watson that they were facts, go very far to prove that he never did have any continuous residence on the homestead in question, and that there were very good and sufficient reasons why he could not have such residence, namely, that he had run off some horses and that the settlers did not want him to go back. It was much stronger evidence as to the state of his mind and his intentions with regard to his residence than could ordinarily be given in any case that could be imagined. The chimerical theory now evolved from the inner consciousness of the counsel for plaintiff in error, that this testimony tended to besmirch the character of his client, is absolutely untenable when examined in the light of the cold type of the record. It even warrants the suspicion that some such transaction between the defendant and the man Watson did take place, and that the knowledge of this fact has now caused the upbuilding of the theory as to the purport and effect of the testimony of the witness Shephard. There is certainly nothing in the record itself to support any such assumption or claim. This testimony of Shephard must stand or fall, then, upon the same basis of legal rules of evidence as the testimony of Putnam. If that testimony as to declarations made by Watson to him as to Watson's residence and his intentions with respect thereto are admissible, then clearly the testimony of Shephard was also so admissible, and the objections and exceptions thereto do not constitute reversible error.

POINT IV.

It was not error to admit evidence of other alleged perjuries of the same general character and description, namely, in con-

nection with fraudulent homestead entries committed by the defendant Barnard.

The argument and brief of counsel for plaintiff in error cites a large number of authorities and quotes from some of them in reference to this proposition, but he destroys the whole effect of them by the tacit admission contained in the heading of his point on this proposition at page 33 of his brief that such evidence is admissible when it does tend in some way to show knowledge, design or system.

The very essence of the crime of perjury is a corrupt and wilful intent to falsely swear. If there is any class of cases in which the commission of other similar offenses can be proved to show a wrongful and corrupt intent perjury falls within that class. We do not think it necessary to spend any time upon the consideration or an argument of this alleged error, because this Court has considered the whole matter fully and determined it against the contention of counsel for plaintiff in error in the case of

Gesner v. United States, 153 Fed. 46,

in which the celebrated case of

People v. Mollineaux, 168 N. Y. 264,

which contains the most elaborate review of the authorities on this subject that has perhaps ever been attempted, is cited with approval. This Gesner case has been affirmed on this point by the Supreme Court of the United States, in

Williamson v. United States, not yet reported.

POINT V.

It was not error for the Court to permit the prosecution to cross-examine the character witness Stewart on behalf of the defendant as to particular acts of alleged wrongdoing.

It appears that the witness James Stewart, who was the United States Commissioner who was alleged in the indictment and proved at the trial to have administered the oath and taken the false testimony of the defendant Barnard in question in the case at bar, was called by Barnard as a witness to his general reputation for truth and veracity, and under the objection and exception of the counsel for the defendant the prosecuting attorney was allowed to cross-examine this witness Stewart as to whether the defendant had made final proof before him, Stewart, for his own homestead. The particular matter alleged as error by counsel for plaintiff in error is set forth at pages 109 to 112, and also more fully at pages 175 to 181 of the record, from which it would seem that the witness Stewart was shown a paper and asked whether he had ever seen it before, to which he replied that it was Coe Barnard's final proof for a homestead that he had proved up on before Stewart, and he was then asked the question, "What homestead, do you know?" This question was objected to by defendant's counsel as not proper cross-examination, as incompetent and immaterial and irrelevant, whereupon the Court asked the District Attorney, "What do you propose to show?" and Mr. Bristol for the Government stated, "I propose to show matter affect-
"ing the truth and veracity of the defendant Coe Barnard,
"nothing more or nothing less."

"THE COURT: Can you show this by a specific in-
"stance?

"A. I propose to show by this witness that Coe D.
"Barnard, before this witness as a United States Com-
"missioner, swore to the fact that he had continuously
"resided on a homestead other than the place he did
"reside."

And thereupon the Government asked that the ruling upon the question be postponed until after adjournment for lunch, and when the Court had reconvened, the Court overruled the objection, to which ruling of the Court the defendant by his counsel then and there in open Court excepted, and thereupon the witness testified:

"A. The homestead described here" (indicating the final proof which had been shown him).

Thereupon the following question was asked:

"Q. What is the fact, Mr. Stewart, what is the fact
"as to whether or not you have heard or know whether
"Coe D. Barnard, on or about the 23d day of June, 1905,
"before you as United States Commissioner, gave any
"testimony under oath then in the matter before you."

Whereupon the defendant objected to that part of the question in which the witness is asked to state as to what he knows of his own knowledge, but the objection was overruled and the defendant excepted and his exception was allowed, and thereupon the final proof paper which had been shown to the witness was offered in evidence. It is printed in full at pages 57 to 68 of of the record.

It is true that the counsel for the Government did at first state, as shown by the quotation from the record above, that the purpose of this evidence was to affect the

truth and veracity of the defendant Coe Barnard, but whatever he may have said at that time, he expressly limited it later (see pp. 176, 177) to showing that the witness Stewart had knowledge that should have "entered "into his estimate of the truth and veracity of the person "inquired about," and when the Court came to charge the jury it closely limited the effect of this testimony, as follows:

(See Trans. of Rec., page 135.)

"You will remember also that today the United States "Commissioner testified as to the reputation of the defend- "ant for truth and veracity in the community in which he "lived. Upon cross-examination there was a proof which "had been made by the defendant upon certain land other "than that upon which it is contended he made his home "for a long time. The applicability of this is limited to "the question of the credibility of the witness Stewart in "his testimony which he gave as to the reputation of the "defendant, that is, it is offered for the purpose of affect- "ing the credibility of the statements made by the witness "Stewart."

While it is probably true, as stated by counsel for the plaintiff in error and in the authorities which he cites and quotes, that evidence of specific acts of a defendant is not admissible as tending to destroy his reputation for truth and veracity, it has never yet been held that a character witness who testifies to his knowledge of the reputation of a defendant may not be asked as to some acts in which he himself participated, whether in connection with the defendant or others, which tend to destroy the credibility of the character witness himself.

Hence, limited as the effect of the testimony was by the charge of the Court, it certainly was proper evidence. Indeed, similar evidence was held to be admissible in Davis v. the United States, 107 Fed. 753, 757, 758.

In this case (Davis v. United States), it appears the district attorney asked a question on cross-examination of one of the defendant's witnesses in reference to an occurrence at the session of the District Court in 1905. This question was as follows:

"Was not that the same time George Davis was sent up?"

To which the witness answered:

"It was."

The Court, on page 758, after considering the question as to whether an exception had been properly taken to this question, said:

"But if we assume the rule to be, as modified by the "exception, it remains that the evidence was of a fact "bearing upon the question of the character of the defend- "ant *which was put in issue by his tendering evidence that "it was good,* and that the evidence related to a period con- "tinuing to the time of the trial."

Thus it will be seen that the Circuit Court of Appeals permitted the question, above mentioned, to be asked of the witness on cross-examination because the defendant had tendered evidence that his character was good, and also that the evidence thus allowed related not to what the witness had heard as to the character of the defendant, but as to a specific occurrence, which was that the defendant had been sent up to the penitentiary at a certain time.

In Commonwealth v. O'Brien, 119 Mass. 342, s. c. 20

Am. Rep. 325, the Supreme Court of Massachusetts cites and quotes from the deliverance of Chief Justice Cockburn, in the celebrated case of Regina v. Rowton, Leigh and Cave C. C. 520; s. c. 10 Cox's C. C. 25; upon the proposition that as the prisoner can only give evidence of general good character, so the evidence called to rebut it must be evidence of the same general description showing that the evidence which has been given in favor of the prisoner is not the truth, and that the man's general reputation is bad, and then proceeds as follows:

"It is true that upon cross-examination of a witness, "testifying to general reputation, questions may be put "to show the sources of his information, and particular "facts may be called to the witness' attention, and he may "be asked if he ever heard of them; but this is allowed, "not for the purpose of establishing the truth of these "facts, *but to test the credibility of the witness, and to "ascertain what weight or value is to be given to his testi-"mony.*"

In Basye v. State, 63 N. W. Rep. 811, 818, 819, the Supreme Court of Nebraska, in a well considered opinion, used this language:

"While particular facts are inadmissible in evidence "upon *direct* examination for the purpose of sustaining or "overthrowing character, yet this doctrine does not extend "to *cross-examination.* It is firmly settled by the adjudi-"cations in this country that, upon cross-examination of "a witness who has testified to general reputation, ques-"tions may be propounded for the purpose of eliciting the "source of the witness' information, and particular facts "may be called to his attention, and he be asked whether

"he ever heard them. This is permissible, not for the pur-
"pose of establishing the truth of such facts, but *to test*
"*the witness' credibility,* and to enable the jury to ascer-
"tain the weight to be given to his testimony. The extent
"of the cross-examination of a witness must be left to the
"discretion of the trial court."

Citing numerous cases.

Again, in Randall v. State, 32 N. E. Rep. 305, 306, an Indiana case, a character witness was asked several questions as to what he had heard as to the defendant having been accused of other offenses and arrested in any other county on the charge of malicious trespass. The witness was allowed to answer this question to the effect that he had learned that the accused had been convicted and imprisoned for shooting a turkey; the Court said:

"The witness having testified to a knowledge of the
"character of the accused, and that it was good, it was
"proper by a cross-examination to develop the extent of
"his knowledge of his character and the facts upon which
"his opinion was based. That the jury might properly
"weigh his estimate of character, it was right *that they be*
"*fully informed of the facts within the knowledge of the*
"*witness* which led him to the formation of that estimate.
"The extent to which the cross-examination might be car-
"ried rested largely in the discretion of the trial court.
"We cannot say that there was such abuse of that discre-
"tion as would justify a reversal. McDonel v. State, 90
"Ind. 320; Wachstetter v. State, 99 Ind. 290. *A cross-*
"*examination of a witness under such circumstances is in*
"*the nature of a trial of the witness.* The facts thus devel-
"oped had no bearing on the question of the guilt or inno-

"cence of the accused, save as they may have tended to "shake or sustain the credibility of the witness, or to "weaken or strengthen his estimate of the character of the "accused."

And see also

Le Beau v. People, 34 N. Y. 223, 234;

Real v. People, 42 N. Y. 270;

Davis v. Coblenz, 174 U. S. 727.

And Wigmore on Evidence, at the very place cited by counsel for plaintiff in error (Vol. 2, page 1144), goes on further in his philosophical method of discussing the rules of evidence, to seriously question the wisdom of the rule which has so long prevailed and which is apparently established, by which the cross-examining counsel is permitted, in the guise of asking a witness whether he has heard of various acts of wrong doing on the part of the defendant, as permitting that to be done indirectly which is forbidden to be done directly, that is, bringing into the case specific acts which the defendant has no opportunity to disprove. However interesting or well founded this criticism may be it certainly serves to raise the query as to whether in such a case as the case at bar, where the very witness upon the stand testifying as to good character, is the official before whom the defendant himself had committed the perjury for which he was being tried, it would not be well, and is not entirely proper, to go sharply to the crediblity of the witness and public officer by calling to his attention the fact that to his own knowledge the defendant had sworn falsely in another matter before him.

The Court will also note that it appears from the homestead entry proofs set forth in the indictment, and

from the homestead entry proofs of the defendant Barnard himself in support of his own homestead entry, the admission of which, in connection with the testimony of the witness Stewart, is claimed to be erroneous, that the officer, namely this same character witness Stewart before whom the testimony is taken, is required to call the attention of the witness to the section of the United States revised statutes relating to perjury and to state to him that it is the purpose of the Government to find out if he testified falsely, and to prosecute him to the full extent of the law. (See Record, pp. 61 and 203).

We have, then, in the case at bar, an officer of the United States Government, sworn to perform his duty as such and duly notified that he must warn the witness against perjury, coming on the stand and testifying to having taken false oath of the very man whose character he was testifying was good.

We have searched the books in vain to find a case just like this where the proof shows that the particular act proved was an act in which the witness himself participated. Surely if there ever was a case in which there should be partial exception to the general rule forbidding proof of specific acts, this was such a case, and within the spirit if not the full and complete declarations of the authorities above quoted, it would seem that such cross-examination was not erroneous when limited, as it was, by both the Government and the Court itself in its charge to its true bearing on the credibility of the character witness.

This goes to the question of the interest of the witness in testifying in defendant's favor. If the witness could

by testifying to Barnard's good character secure his acquittal, it might shield the witness from the exposure or consequences of his own misconduct. If the witness had been associated with the defendant in the commission of a similar crime, the jury were entitled to know this fact to enable them to properly weigh the testimony of the witness, as well as to show intent of defendant in committing the crime for which he was being tried, as we have fully argued in another paragraph of this point.

But if any error was committed in this respect, which we deny, the testimony of this witness as to the final proof made by Coe Barnard before him on his own homestead could not have done any harm, because on the redirect examination of the witness Stewart by counsel for Barnard he testified that he did not know anything about Barnard's living on his homestead claim that he proved up on before the witness except what he swore to in his proof, and he was asked the specific question, "Do you "know anything as to whether the statements made in his "proof were true or false?" and he answered, "I do not."

But, assuming that this proof as it went in did tend to show that Coe Barnard had sworn falsely to a homestead entry of his own on the very day in which he made the proof for the claimant Watson charged as a perjury in the indictment here, towit, June 23, 1903, that evidence was admissible, and, indeed, need not have been limited by the Court as it was to affecting the credibility of the witness Stewart, but falls under the category of showing other similar offenses committed by the defendant Barnard at about the same time and relating to substantially the same subject matter as that specified in the

indictment, which was held admissible in the case of Gesner v. United States, and which class of evidence has been considered in Point IV of this brief. It is not to be charged against the Government that the Court may have made a mistake limiting the testimony too closely. If the testimony was admissible at all for any purpose, the fact that the Court limited it in a manner which was incorrect and too narrow should not prejudice the Government.

It will be noted in this connection that the counsel for the plaintiff in error, when the Court delivered its charge to the jury limiting the testimony in its effect to bearing on the credibility of the character witness Stewart, did not take any exception.

(See Trans. of Rec., page 135, quoted supra.)

We insist that a careful examination of the record in reference to this particular alleged error will show that it was as to a matter which did not go before the jury in such a way as to prejudice the defendant at all, and if it was erroneous may therefore be disregarded.

FINALLY.

As we have shown above, the Bill of Exceptions does not purport to contain all the evidence in the case, but does contain a statement that there was other testimony besides that contained in the bill "tending to corroborate "the other witnesses for the Government and tending to "show the facts stated in the indictment."

The defendant has been convicted by the verdict of a jury on abundant testimony and after a most careful and impartial charge of the Court to the jury. In such cases as this it has long been properly the custom and practice of the Courts to disregard all technical defects or errors, and indeed any alleged errors concerning which it does

not clearly appear that they militated heavily and wrongfully against a fair and impartial trial, and every reasonable presumption is always indulged in that the verdict was right and that exact and substantial justice has been done. The judgment should therefore be affirmed.

FRANCIS J. HENEY and
TRACY C. BECKER,

Special Assistants to the Attorney General of the United States, of Counsel for Defendant in Error.

In the

United States Circuit Court of Appeals

For the Ninth Circuit

COE D. BARNARD,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendent in Error.

Reply Brief

BENNETT & SINNOTT
Attorneys for Plaintiff in Error

CHRONICLE PRINT THE DALLES, OR.

IN THE

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REPLY BRIEF

INDICTMENT INSUFFICIENT

There is no difference between the position taken in the brief of the respondent and our own in relation to the general principles covering indictments in cases of this kind.

It is said on page 7 of respondent's brief,

"Where there is a general allegation of general authority conferred by law upon an officer to administer an oath it is never necessary to set out that he had particular authority to administer the particular oath in question, provided, of course, the indictment contains, as this one does, *the allegations showing the pendency of the proceeding* and materiality of the testimony in which the oath was taken."

We do not disagree with the proposition of law contained herein, provided that the indictment does show the *legal pendency of the proceeding*. Such an indictment would have

been good at common law and independent of the statute. but, to make such an indictment good it must show the steps taken to make the proceedings legally pending.

(See text book citations page 22 of Main Brief.)

It is not enough, however, to simply allege that the court or officer was engaged in taking testimony in a certain matter or between certain parties. Such an allegation does not show that there was any proceeding pending at all. It simply shows that the officer has taken it upon himself to proceed to hear testimony in the given matter; but, whether the steps have been taken which make the action or proceeding legally pending or give him *authority* to take testimony or administer an oath in the partcular matter does not appear.

Here, as we have seen, there was no attempt whatever to show that there was any proceeding legally pending or that the notices and proceedings had been had which could alone make such action legally pending.

If the officer went outside of his authority and undertook to administer an oath in a matter where the preliminary steps necessary to give him a right to so do had not been taken, his acts would be null and void and the oath could not be a basis for perjury.

It is perfectly plain therefore, we submit, that the indictment does not sufficiently show the pendency of the proceedings to constitute a good *common law* indictment.

NOT GOOD UNDER THE STATUTE——Under the provisions of the Statute (Section 5396) on the other hand, it is necessary to *allege directly* that the officer had authority to *administer the particular oath.*

"It shall be sufficient to set forth the substance of the offence charged upon the defendant and by what court and before whom *the oath* was taken, avering such court or person to have competent authority to administer *the same.*

It is perfectly clear that the words "the same" at the end of the clause refer back to the words "the oath" and that in order to come within the statute there must be and allegation that the officer had authority to administer the very oath upon which the perjury is supposed to be based—not that he had authority to "administer oaths" generally, or "in such cases," when the proceeding was properly brought before him, but that he had authority to administer *"the same" oath* upon which the perjury is based.

When we remember that this allegation was to take the place of the common law requirement that the preliminary steps should be set forth in detail which would give the officer authority to administer the oath upon which the perjury was based, there is no resisting the necessity of at least a *direct allegation of this authority* as to the particular oath under the statute.

A labored attempt is made by the learned attorneys for

respondent to make the general concluding clause of the indictment cover the defect in the charging part, and the learned attorneys with an innuendo which it seems to us might well have been left out, say "counsel for plaintiff in error seem to have ommitted or evaded calling the attention of the court to this portion of the indictment."

We omitted calling attention to it because it never occurred to us for a moment that anyone could or would contend that this general concluding summary was intended to or would cover the direct allegation required by the statute, that the officer had authority to administer the same oath upon which the perjury was based.

The part of the indictment alluded to is the mere general formal conclusion referring back to the facts already alleged in the charging part of the indictment and concluding,

"and so the grand jurors aforesaid upon their oath aforesaid do say that the said Coe D. Barnard *in manner and form aforesaid* in and by his said testimony and upon his oath aforesaid in a case in which the law of the said United States authorized an oath to be administered, unlawfully etc."

This was not the attempted statement of a fact, but a mere conclusion upon the facts already stated—not that any preliminary steps had been taken or that the officer had authority to administer this oath—but that in such cases (that is the taking of final proofs) the law of the United States authorized an oath to be administered.

It is true that the indictment charges that the United

States Commissioner was engaged in taking and hearing testimony in the matter of Watson's application, but it does not allege, either, *the things which would give him the right and authority* to take such testimony, or, the alternative fact permitted by the statute that he *did in fact have authority* to administer *the very oath* upon which the perjury is based.

The rule laid down by the Statute is a very liberal one in favor of the pleader. It permits him to cut out all the preliminary averments as to jurisdiction required by the common law, provided that he alleges directly that the officer in question did have the authority to administer *the oath in question.*. Having permitted this short cut and this simple allegation the statcte has surely done enough and the pleader, if he wishes to take advantage of it, ought surely to comply with its provisions and directly allege the one essential requirement of the statute, that the officer had authority to administer,—not oaths generally of that kind, or in such cases, but, the particular oath in question.

NOT A MERE MATTER OF FORM.—The defect in this indictment is not a mere matter of form. It is a failure to allege a substantial element of the offense,—a failure to allege. The fact that is essential to a legal perjury—a failure to allege that the officer had authority to administer the oath. Without which authority there could be no perjury.

Such defects do not come within 1025 of the Revised Statutes which meets only formal defects, and not cases where an essential element of the crime has been omitted. The cases cited in respondent's brief are not at all in point.

The case of United States vs. Rhoades, 30 Fed. 431 was altogether a different case. In that case the defendant was charged with making a false pension affidavit before a notary public, and in such cases there are no preliminary requirements whatever and the authority of the officer to administer the oath necessarily followed as a matter of law from the very fact that he was a notary public.

Revised Statutes of United States 1778 an Act of Aug. 15, 1876.

This was the ground upon which the decision of the honorable court was put.

In such cases there are no preliminary or jurisdictional requirements such as those which exist in this case.

See appellant's Main Brief, page 19 and 20.

Any person could go before a notary public and make such an affidavit, and of course as we have said, as there was nothing first to be done, the authority of the notary public followed as a necessary matter of law from the very fact of his office, and therefore the making of such an affidavit before him, if made for the purpose of defrauding the government, was a false affidavit within the meaning of the pension statutes.

If any man could go before a commissioner and make

his final proof in a case of this kind at his own option without any preliminary notice of publication, as in the matter of pension affidavits, then of course the case would be entirely different and the Rhoades case parallel with this.

But here there were preliminary steps to be attended to without which any proof would be entirely invalid and could not be the basis of perjury as is admitted in respondent's brief.

The other authorities cited in respondent's brief are merely to the effect that mere formal defects in the indictment *where each substantial element is fully covered*, will not, at least after verdict, vitiate the indictment.

But, where, as we have seen, the defect is substantial, not formal, a total failure to allege one of the things upon which the alleged perjury must be based, if based at all, is fatal.

When the indictment was presented to the defendant he had a right to know from the indictment itself whether or not the government was or was not charging a legal perjury—and if they were not charging in some way that the primary steps had been taken by which the officer would be authorized to administer the particular oath upon which the perjury was based, then he had a right to have it

quashed and dismissed without being put to the expense, annoyance and jeopardy of a trial. Therefore, the indictment itself did not show either directly or indirectly that the oath in question was one which the officer had authority to administer, it was a defect in substance and not in form, and upon its face clearly prejudicial to his rights.

It has never been held or understood that Section 1025 authorized the omission of a substantial and essential element of an offense like this.

United States vs. Davis, 6 Fed. 682.
United States vs. Carl, 15 Otto 611; s. c. 26 L. Ed. 1135.
United States vs. Morrisey, 32 Fed. 147.
More vs. United States, 160 U. S. 268.
Dunbar vs. United States, 156 U. S. 185.

Again this is not a case where the objection was made for the first time after verdict and the question should be considered as arising before a verdict and not after verdict.

More vs. Unitel States 160 U. S. 268.

There was in this case no lying by to entrap the government but the question was raised by demurer at the first opportunity and fully presented. The attention of the district attorney was challenged to the question, and he could, if he desired, and the facts justified, have gone back and perfected the indictment, but he saw fit to stand thereon at his peril, and he shoull stand there now in the same way. He is in no position to claim that it has been affected in any way by the verdict, for the question was raised and the

ruling was made when there had been no verdict and no trial.

We submit again therefore that this indictment cannot possibly stand without making Section 1025 cover substantial defects as well as mere formal matters, and to permit the omission of an essential element of an offense as created by law, which would be in the face of all the authorities.

ADMISSION OF HEARSAY EVIDENCE

It is now urged for the first time that the alleged oral admissions or statements of the claimant Watson, while not admissible for the purpose of showing the physical fact of his residence, are admissible for the purpose of showing his "intention."

We submit to the court in the first place that it is perfectly obvious that the testimony was not offered for the purpose of showing his intention, nor was it directed at all toward such a purpose.

On the contrary the questions asked did not call for his intention at all, but for a *mere narrative* as to where he had been and what he had been doing. The first question asked was,

Q. State whether or not there was anything in that conversation that showed or tended to show *where Watson had been about that time or immediately preceding it.*

It is perfectly plain that this question called for no element of intention but for a mere narrative as to the physical fact of where Watson had been and what he had been doing. It could only be admissible as an admission upon his part of his physical absence from the claim in question —an admission of the physical fact that he had not for a given period of time been upon the land in question. It called, as we have said, for no element of intention whatever and the court permitted it to be answered upon the theory that "it bore upon the question as to whether or not *Watson did state the truth* in regard to the answer that he made in making his proof." In other words it bore—and and could only bear—upon the question of whether or not he had been continuously upon the land as stated in his final proof and also in the corroboratory affidavit of the defendant.

He was permitted to answer that defendant had said he was working on the Columbia River down about St. Helens somewhere.

Again the subsequent question shows this purpose all the more plainly.

Q. What was the logging camp (where he had been working)? Did he state?

A. It was somewhere about St. Helens, somewhere down about in there, I think it was.

Transcript page 81.

It is perfectly clear that this was inadmissible.

Kirby vs. U. S. 55 and authorities cited in main brief page 27:

And so of the alleged admissions to Putman, on page 86 where it is perfectly obvious from the persistent questioning of the District Attorney that he had the double purpose of showing: First, that Watson had not been upon the land for some time, and, Second, inducing the jury to believe that Watson had been a *bad man who had been engaged in horsestealing,* and that defendant and others were associated with him therein.

Q. What was the fact about their saying anything at that time about the ranch?

A. Same objection, as incompetent, not in any way bearing upon the defendant and hearsay. Objection overruled and defendant excepted.

Whereupon the witness answered, he said he wanted to go back and prove up.

Q. *Did he say why?*

Same objection, ruling and exception.

A. He said parties wanted him to go back and prove up.

Q. *Did he say why?*

Same objection, ruling and exception.

A. He said parties wanted him to go back.

Q. Whom did he say wanted him to go back?

Same objection, ruling and exception.

A. He had reference to Mr: Hendricks:

Q. *And did he give you any reason as to why he would not go back?*

Same objection, ruling and exception.

A. He didn't think the people wanted him, I guess.

Q. *Didn't he tell you why?*

Same objection, ruling and exception.

A. No, he didn't tell me exactly.

Q. *Did he give you any reason why?*

Same objection, ruling and exception.

A. *Well, all the reason was that there were some horses run off that spring and he was hired to do it and he didn't suppose the settlers wanted him to go back.*

Whereupon the counsel for the defendant moved to strike out the conversation between the witness and Watson on the ground that the testimony is incompetent and hearsay against this defendant.

Whereupon the court asked: "The conversation was all with Watson?. A. Yes, sir.

THE COURT. Its relevancy may be as to the bearing on the question of residence upon the claim by Watson.

Whereupon the court ruled that for that plrpose it was competent and the defendant excepted and the exception was allowed.

Transcript pages 86 and 87.

Is it not perfectly plain that the object of this persistent questioning was not to show any "intention" on the part of

Watson, but to drag out his supposed admission that he had been *guilty of horsestealing* and that others presumably the defendant among them had been associated with him in that business, and thereby prevent the jury from giving the defendant the fair consideration which every defendant is entitled to at the hands of a jury?

The attempt to bring this within the intention rule is obviously far fetched and labored: In the first place it can hardly be supposed that the testimony of a corroboratory witness in a homestead case can have reference to the *intention* of the claimant. Such corroboratory witness cannot be supposed to know the intention of the entryman; all he can know is the physical facts upon the ground—the improvements thereon—the time that the entryman was there, etc. While the intention of the claimant is no doubt an important consideration in concluding as to *his* good faith in the entry, yet, it is hardly a thing about which a charge of perjury as to such corroboratory testimony ought to be based. The most that the corroboratory witness could possibly swear to in that regard was *his belief* in relation thereto. It is incredible that the government intends to have the affidavit of such a witness go farther.

It is true and we do not dispute that in proper cases declarations of the intention of a party *accompanying an act* is admissible in evidence as a part of the *res gestae* of that action. The cases cited in respondent's brief do not go any farther than this.

The Maryland case simply declares the general rule above mentioned.

The Massachusetts case was a will case, and therefore came under the peculiar rule "as to the declarations of a testator."

The Maine case cited from the 98 Maine 493, Sec. 57 Atl. 792, undoubtedly declares the true rule and makes the correct distinction. The case was one involving a question of a pauper settlement and the Court said:

"The paupers intention is a question of fact. He could have himself testified to it, and his declarations could be received in evidence of it. *but only if the accompanying acts which they explain* show that they are regarded as a *part of the acts* from which his intention be inferred."

Here as we have seen the declarations offered were not part of any actions. They were not made while the claimant was on the land, or *while he was doing any act in relation to the land*, but they were of the character of *mere narratives* made in another county, miles away from the land in question, and having reference to the whereabouts of the claimant at different times and to his supposed larceny of horses.

The California case cited by respondent is a case where the declarations against interest of a privy in title prior in point of time to the adverse party was involved and of course came under the rule of declarations against interest *where the parties are in privity.*

The New York case was similar to the Maine case and it clearly illustrates the rule. It was a declaration accom-

panying an act of the party in transferring his certificate of deposit, and, of course, was a part of the res gestae of that act.

The Wright case from the 130 Federal and the case of Brown vs. United States, from the 142 Federal are not at all in point, and the Wallace case only declares the general rule.

The same may be said of the Mutual Life Insurance Company, vs. Hillman, 145 U. S., in which the declaration in question was a letter of a person claimed to have been killed written a few days before the supposed killing, and referring to his intention and purpose in going to a certain place.

So the case from the 141 Federal was very similar and was a declaration of a party, alleged to be lost on a wrecked boat, made a short time before as to his intention to travel on said boat.

These cases are far from a case like the one under consideration and the true rule in such cases as this is presented, we think, on the contrary, in the case of Kirby vs. United States 174 U. S. 55; s. c. 43 L. Ed. 894, in which there was an attempt to use a judgment against the original thieves on a trial for receiving stolen property, such jcdgment being based upon *the confession* of the original thieves, but the Supreme Court of the United States held that the Act of Congress authorizing such admissions was unconstitutional, saying:

"But a fact which can be primarily established only by witnesses cannot be proved against an accused—charged with a different offense for which he may be convicted without reference to the principal offender—except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases."

So the Maine case of Corinth vs. Lincoln 34 Maine 312, says:

"But declarations cannot with propriety be received as evidence, unless the act which the declarations accompany, has itself a material bearing upon the issue presented; for the act is the principal fact, and the declarations are received, as tending to exhibit the purpose of the agent, which prompted it, and was productive of the act done."

And this doctrine is again declared by the same court in Deer Isle vs. Winterport 87 Me. 37; s. c. 32 Atl 720.

See also authorities cited in main brief, page 27. Indeed the principles were elementary.

But as we have seen, in this case it is obvious that the evidence was not offered for the purpose of showing intention—and the questions were not directed towards intention at all, and the answer to the greater number of questions objected to could not by the utmost violence be construed to have any reference to intention.

The evidence was obviously offered upon the theory that because Watson was the claimant that therefore his admissions in so far as they bore *upon his own residence*

upon the land were in a sense binding upon the defendant, or at least could be used as evidence against him and it was upon this theory, that it was competent evidence of the actual *residence* of the claimant, and not of the mere element of intention that it was admitted.

EVIDENCE OF OTHER PERJURIES

In relation to that matter we do not desire to present anything farther to the argument already made on pages 33 to 44 of the main brief, except to say that this case goes obviously much farther than the Gesner case or the Williamson case, because here there was no system or design which could possibly include the subsequent alleged perjuries, and being subsequent, they could not possibly show knowledge or intent.

We submit to the Court that the rule ought not to be extended farther.

POINT 5. ERROR OF THE COURT IN PERMITTING THE GOVERNMENT TO CROSS EXAMINE THE CHARACTER WITNESS STEWART, WHO HAD TESTIFIED TO THE *REPUTATION* ONLY OF THE DEFENDANT, AS TO ALLEGED PARTICULAR ACTS OF WRONG DOING.

The theory upon which the admission of this cross examination is attempted to be justified in the argument of the learned attorneys for respondent is sadly lacking in unity and consistency.

The witness had testified on his direct examination to the *general reputation* of the defendant only. The government upon cross examination was permitted over the objections of the defendant to cross examine the witness as to witness's knowledge of defendant's own proof upon his own homestead alleged by the district attorney to be false.

The learned attorneys for the government argue.

First. That because the witness had testified as to the good character of the defendant that therefore the government should have been permitted to cross examine him as to false statements *made to his knowledge.*

Second. That because the record shown that the witness *did not know* whether the statements were "*true or false*" that therefore the defendant was not injured.

Third. That the testimony though not admissable for the purpose for which it was offered and admitted (that is to discredit the defendant and his character witness) yet, its admission may be justified under the general drag net proposition that it was a "similar act."

This attempted grasping at straws, we submit to the Court, is the best evidence that even the learned attorney for the government is himself convinced that the admission of this testimony was error, and that no satisfactory

grounds can be found upon which to base its support.

It is true that the witness Stewart testified that he had no knowledge as to whether the statements of the witness were true or false, and there was nothing to the contrary.

This ought to dispose of one straw,—the remote and fanciful suggestion that the evidence bore upon the interest of the witness Stewart. Besides, it is perfectly clear from the whole record—from the statements of the district attorney and the responses of the Court that the testimony was neither offered or admitted upon any such ground.

But while it does not appear that the witness Stewart knew of any alleged falsity in Barnard's answer when proof was made before him yet it *does* appear from the district attorney's *own statement* that there was other testimony in the case tending to show that they were false.

We quote from page 183 of the printed transcript where Mr. Bristol says in answer to the Court's interrogatory as to whether the proof in question was on Barnard's own homestead,

"Mr. Bristol: On a place that he at that time was proving up on, *there being evidence already in the record, offered by the defendant's witnesses in that same connection, that the family, including the defendant Barnard never lived anywhere else than upon the home place of Barnard's on Butte Creek, during the entire period, etc.*"

And, as we have already said, it was obviously upon this ground that the Court permitted the testimony to go to the

jury, because it tended to discredit the witness Stewart by showing that he knew of a particular act of the defendant which the testimony of other witnesses were claimed to have proved a perjury, and it was offered by the district attorney for the very purpose of discrediting the defendant himself.

The attempt to justify the admission of this testimony upon the ground of similar acts for the purpose of showing knowledge, design, etc., seems to us hardly worth serious consideration.

It is obviously *an afterthought*, so clearly devoid of any foundation that we cannot believe this Court will consider it.

In the first place the record shows conclusively that it was not offered or admitted for any such purpose. It was not even claimed or suggested that the taking of defendant's own homestead was a part of any system or design or had any relation whatever to the Watson homestead in which defendant admitted he had no interest. Neither was it claimed that it showed any knowledge or want of knowledge in relation to Watson's compliance with the law. Besides it would in no event have been proper *cross examination* for this purpose. The record shows it was offered by the district attorney for the purpose of discrediting the defendant himself, and it seems to have been admitted by the Court upon the theory that it discredited *the witness* by showing that while he had testified that the defendant's

general reputation was good for truth and veracity, yet that he himself *personally knew* of an act of supposed falsehood.

That this cannot be done is abundantly substantiated by the authorities cited in appellant's main brief, pages 46 to 49. Indeed this is practically conceded by the learned attorneys for respondent in their brief, but the rule is sought to be evaded upon what seems to us the merest quibble.

It is true that a witness as to general good reputation may be cross examined as to what he has *heard said* about the defendant and incidentally of course as to whether he has *heard* of specific acts of reputed bad conduct, because this makes up a part of his general reputation and is therefore proper cross examination; but there is a wide distinction which all the authorities recognize, between this, and an attempt to cross examine as to acts about which the witness has not *heard,* but may have some *personal* knowledge.

A witness as to general reputation not only does not swear as to his own personal knowledge of the character of defendant, but he *would not be permitted* to testify to such personal knowledge. He might have known of a hundred honest and truthful acts of the defendant, some of which might perhaps be of great import to the jury, but he could not tell one of them, because his examination is confined under the rules of law *to general reputation alone.* So it would be manifestly unfair to permit upon cross examination the inquiry into personal knowledge of supposed bad acts.

This distinction is fully presented by the excerpts from Wigmore on page 49 of the appellant's main brief, as well as the other quotations on pages 48 and 49.

The authorities cited in appellant's main brief are nearly all cases where the witness was cross examined, not as to the witness's *own knowledge,* but as to *rumors* he had *heard* of supposed particular acts, and, of course, such cross examination is unquestionably proper.

This was the character of Commonwealth vs. O'Brien 119 Mass. Basye vs. State 63 N.W. and Randall vs. State 32 N.E., and indeed all the other cases cited.

Here the objection was timely and fully made: every objection that could be possibly made to the introduction of the testimony and the whole matter and the grounds, as the record shows, were fully and completely presented to the Court. The objections were that it was *not proper cross examination*, incompetent, immaterial, and irrelevant, and the record shows that the whole question was fully thresh-out before the Court, and we submit to the Court, that it is impossible in any way to jusify the admission of this cross examination.

FINALLY

Under this head it is said in the brief of the learned at-

torneys for respondent that the defendant has been convicted by the verdict of the jury on *abundant testimony*, etc.

Whether there was "abundant testimony" for the verdict in this case, this Court cannot know, neither is it for either the attorneys for the respondent or for us to say. We could never agree upon that question, and we respectfully submit that it is not for this Court to pass upon the "facts" or to say whether or not as a matter of fact the defendant ought to have been convicted.

It is for the Court as we understand it to pass upon the questions of law, and leave the questions of fact to be decided by a jury when the case has been submitted to a jury *according to the rules of law* as created by the government itself. When those rules have been followed—when a proper indictment has been submitted—and the case has been submitted to the jury upon legal evidence and nothing else and when the jury has returned a verdict,—then, and not till then, will the defendant be presumed to be guilty. Until that time the presumption of innocence continues to apply.

It is also said in the brief of the learned attorneys for respondent that

"In such cases as this it has long been properly the custom and practice of the Courts to disregard all technical defects or errors, *and indeed any alleged errors concerning which it does not clearly appear* that they militated heavily and wrongfully against a fair and impartial trial."

If any such a rule has ever been the practice of this Court, it has never been declared in any case so far as we know, and we do not believe it can have been the practice.

for we submit to the Court that it is contrary to every established principle.

We concede that it is for us to show there was an error in the rulings of the court, but when a ruling is presented which is apparently erroneous, the burden shifts and it is for the other side to show, and to show clearly and beyond a doubt, that there was no prejudice.

In Wilkinson vs. United States, 12 Howard 247; 13 L. Ed. 975, a bond was offered in evidence and rejected by the Court. Nothing further appeared in the record except that the bond was offered and rejected. It was argued that there might have been objections to the paper which did not appear on the record, but the Court says:

"But here the paper is shown by the statement in the exception to be legally admissable. The error, therefore, is apparent; and no presumption can be made in favor of a judgment, where the error is apparent on the record.

"If there was any fact which, notwithstanding the authentication of the copy, made it inadmissable, it ought to have been shown by the defendants, and set forth in the exception. And where no such fact appears, it must be presumed not to exist. A contrary rule would make the right to except of no value to the party, and would put an end to the revisory power of the appellate court whenever the inferior tribunal desired to exclude it."

So in Mexia vs. Oliver, 148 U. S. 664; 37 Ed. 602, the Court had permitted the introduction of certain powers of attorney, which ruling was held to be erroneous, and it was claimed that their admission was immaterial and did not prejudice the rights of the plaintiff, but the Court says:

"We cannot say that these errors were immaterial, as it

does not appear *beyond doubt* that they were errors which could not prejudice the rights of the plaintiff."

If there has ever been any other holding in the Federal Courts upon this question we have never heard of it.

So the California Supreme Court in Cahill vs. Murphy, 94 Cal. 29; 30 Pac. 195 and 196 says:

"The rule in this state is well settled that injury will be presumed from error unless the record affirmatively shows to the contrary."

And the Supreme Court of Oregon in Dubois vs. Perkins, 21 Ore. 189 in a case where the conversations of an outsider had been received in evidence over objections, says:

"How this conversation could affect or bind him does not appear; in fact its competency was not claimed on the argument here, only as it may be supposed to have been rendered competent by other evidence given upon trial, but which is not in the bill of exceptions. It was accordingly argued for the purpose of sustaining the judgment, we must presume that such evidence was actually given upon the trial. But this is not the correct rule. While it is true that error will never be presumed, the converse of the proposition is equally true. *When error does affirmatively appear it will not be presumed that it was rendered harmless or removed.*. If it were not so the respondent must see to it that the matter which renders it harmless or removes it is made to affirmatively appear in the bill of exceptions."

The citation upon this point might be multiplied indefinitely, so well is the rule established,and so unanimous the opinions of the courts thereon, but we have only cited those which are controling or which by reason of locality bear persuasively upon this Court.

It is not for us to show that the errors of the Court below

"militated heavily against us", or that they militated against us at all except that it *may have* influenced the jury. Can anyone doubt that any one of the errors we have indicated in this brief *may have* influenced the jury against the defendant? If this is true it is for the other side to show, and show *beyond doubt* under the decision of the Supreme Court of the United States in the Mexia case that it did not and could not have influenced the jury.

There is no attempt to show anything of the kind and it is perfectly clear that the admission of the testimony complained of was of such a character that it not only might, but that it surely did, influence the jury more or less. Whether or not the same verdict would have been reached if this testimony had been excluded it is impossible for this court or anyone else in the world to say, but we submit that we are entitled as a matter of law to a reversal in this case both upon the insufficiency of the indictment and upon the erroneous rulings in the admission of evidence.

Respectfully submitted,

BENNETT & SINNOTT,

Attorneys for Appellant.

1499

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

COE D. BARNARD,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

PETITION FOR REHEARING.

ALFRED S. BENNETT,
Attorney for Plaintiff in Error.

The Dalles, Oregon:
A. N. Bohn, Book and Job Printer
305½ Second St.

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Now comes the defendant in the above entitled cause by Alfred S. Bennett, his attorney, and respectfully petitions the Court for a re-

hearing of the above entitled cause, and as grounds therefor presents the following:

In relation to the last point presented to and decided by the Court in this cause, to-wit: "The question of error in permitting the learned district attorney to cross examine the witness Stewart"—a witness as to the general reputation of the defendant only, as to specific acts of alleged ill doing, claimed to be within the knowledge of the witness, it appears to us that this honorable court has clearly overlooked the state of the record.

The Court says in its opinion, "If the admission of this evidence was error, it was clearly without prejudice *as it was not contradicted in any particular.* So far as the evidence submitted to the jury was concerned *it stood as a truthful statement*, and therefore without any prejudicial effect upon the jury."

Now while the status of the case in this regard is not, it is true, very fully presented by the record, yet we think that it does not at all sustain the conclusion of fact reached by the Court.

In the first place the evidence *is not all presented by the record, and does not purport to be*, and therefore in order to reach a conclusion that the cross examination of this witness as to Barnard's homestead proof before him was not contradicted and did not contradict or tend to dis-

credit his statement on the direct examination that the general reputation of the defendant for truth and veracity was good, it can only be sustained by a *presumption*.

Such a presumption can only be sustained by over-ruling or refusing to follow the decisions cited by plaintiff on page 24 and 25 of his reply brief, which directly hold that where *there is error*, no presumption whatever can be indulged that it was not prejudicial, and if it is claimed that by reason of evidence or lack of evidence, the error was without injury, that fact must be made to appear in the record by the respondent, or otherwise the presumption will be that the error *did work an injury*.

As two of the decisions cited are decisions of the Supreme Court of the United States and are directly in point, and which have never been modified, or over-ruled it seems impossible to me that the court has intentionally refused to follow them, and I infer therefore that the application of the principle in this case has been overlooked.

In addition to these authorities I call the attention of the honorable court to the case of Miller vs. Territory of Oklahoma, 149 Fed. 339

in which the Circuit Court of Appeals for the 8th Circuit in a decision as late as Dec. 13, 1906, re-affirms the doctrine and says:

"The foregoing incident strikingly illustrates where the responsibility for the miscarriage of justice in criminal prosecutions should some times be placed, instead of imputing the reversal of convictions by the appellate courts to what is popularly termed 'mere technicalities.' The zeal, unrestrained by barriers, of some prosecuting attorneys, tempts them to an insistence upon the admission of incompetent evidence, or getting before the jury some extraneous fact supposed to be helpful in securing a verdict of guilty, where they have prestige enough to induce the trial court to give them latitude. When the error is exposed on appeal, it is met by the sterotyped argument that it is not apparent it in anywise influenced the minds of the jury. The reply the law makes to such suggestions is: *that after injecting it into the case to influence the jury, the prosecutor ought not be heard to say, after he has secured a conviction, it was harmless.* As the appellate court has not insight into the deliberations of the jury room, the presumption is to be indulged, in favor of the liberty of the citizen, that *whatever the prosecutor, against the protest of the defendant, has laid before the jury, helped to make up the weight of the prosecution which resulted in the verdict of guilty.*"

Here the language of the learned court cited above is especially pertinent as in this case the attorneys for the defendant protested earnestly and repeatedly at the trial against the introduction of this incompetent testimony and again and again objected, both at the times the questions were asked, and again by motions to strike out.

Ought the district attorney in justice and fairness, after presistently presenting this testimony to the jury and taking repeated rulings of the court thereon, to say that the testimony, which he was claiming would prove falsehood on the part of the defendant and discredit the character witness, would not probably have that effect on the mind of the jury, and therefore was not prejudicial.

Besides the record shows, both by the statement of the district attorney itself and even from the mouth of the court, that there was testimony tending to show that the statements made before the witness in the defendant's final proof were false.

In the final proof offered as a part of the cross examination of this witness it appeared that Barnard had sworn that he had resided on his homestead claim, Mr. Bristol on the motion to strike out (printed record page 183), says:

> That this proof was "on a place that he, at that time was proving up on, *there being evidence already in the record offered by the defendant's witness* in that same connection that the family, including the defendant Barnard, had never lived anywhere else than upon the home place of Barnard on Butte Creek, during the entire period." (which home place of Barnard's was an entirely different place than his homestead).

Again the Court in its instructions to the jury, said:

"You will remember also that today the United States Commissioner testified as to the reputation of the defendant as to truth and veracity in the community in which he lived. Upon cross examination there was a proof which had been made by the defendant upon certain land *other than that upon which it is contended he made his home for a long time.* The application of this is limited to the question of the credibility of the witness Stewart in his testimony which he gave as to the reputation of the defendant, that is it is offered for the purpose *of affecting the credibility of the statement made by the witness Stewart.*"

We assume that these statements in the record were overlooked by this honorable court for with them in mind we cannot believe that this court would indulge in a presumption "that there was no contradictory evidence in the records, or that the defendant was not prejudiced by the introduction of this testimony, especially in view of the decisions of the Supreme Court of the United States cited above, that no such presumptions can be indulged in.

It is perfectly plain in this case that there *was such contradictory evidence*, or at least that there was evidence which both the learnerd district attorney and the honorable court believed to be contradictory and upon which the jury may have so found.

We submit therefore that this phase of the case is entitled to re-consideration at the hands of this honorable court.

Upon the main question of *this being error*, we think there can be no dispute and there seems no necessity of adding anything further than the presentation of the matter upon pages 45 to 49 of plaintiff in error's main brief, and page 18 to 22 of the reply brief.

However much we may feel aggrieved at the decision of this honorable court upon the other questions involved they have been squarely passed upon and there is nothing further to say, and thereon we can only bow to the decision of the court. But as to this question, the conclusion of the court seems to rest so entirely upon a mistake of fact as to the condition of the record that we respectfully ask for a re-hearing.

ALFRED S. BENNETT,
Attorney for Plaintiff in Error.

UNITED STATES OF AMERICA,
DISTRICT OF OREGON. } ss.

I, A. S. Bennett, an attorney of the above entitled Court, do hereby certify that in my judgment the above petition for rehearing is well founded and that the same is not interposed for delay.

Dated this 28th day of May, 1908.

ALFRED S. BENNETT.

No. 1500

UNITED STATES CIRCUIT COURT of APPEALS

FOR THE NINTH CIRCUIT.

THE COLUMBIA VALLEY RAILROAD COMPANY,
Appellant,

vs.

THE PORTLAND AND SEATTLE RAILWAY COMPANY
(a Corporation),
Appellee.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court for the Western District of Washington, Northern Division.

FILMER BROS. CO. PRINT, 1642 HOWARD ST., S. F. CAL.

No. 1500

UNITED STATES CIRCUIT COURT of APPEALS

FOR THE NINTH CIRCUIT.

THE COLUMBIA VALLEY RAILROAD COMPANY,
Appellant,

vs.

THE PORTLAND AND SEATTLE RAILWAY COMPANY
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In the Circuit Court of the United States for the Western District of Washington.

No. 1384.

THE COLUMBIA VALLEY RAILROAD COMPANY (a Corporation),

Plaintiff,

vs.

THE PORTLAND AND SEATTLE RAILWAY COMPANY (a Corporation),

Defendant.

Bill of Complaint.

The said complainant, the Columbia Valley Railroad Company, complains against the said defendant, and alleges the following facts, to wit:

I.

That said complainant, the Columbia Valley Railroad Company, now is and ever since the 16th day of February, 1899, has been a corporation duly organized and existing under the laws of the State of Washington, for the purpose of building, equipping, operating or acquiring a railroad and telegraph line from Wallula on the south bank of the Columbia River in the State of Washington, thence across the Columbia River at a point at or near Wallula, and thence by some eligible route along the north bank of

the Columbia River to a point in the State of Washington on the Columbia River, at or near the mouth of the said river, and to maintain, operate, lease, construct or acquire the said railroad or telegraph line or lines, to carry freight or passengers thereon and transmit messages thereover, and to receive tolls for the carriage and transmission of the same, and to do all things necessary or proper for the accomplishment of the objects as specified in its articles of incorporation.

II.

That the defendant is a corporation organized under and in pursuance to the laws of the State of Washington, for the purpose of constructing and operating a railroad.

III.

That the complainant claims the right of way hereinafter described over the public lands of the United States hereinafter described under and by virtue of the provisions of the act of Congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States."

That the said act of Congress among other things provides that the right of way through the public lands of the United States is thereby granted to any railroad company duly organized under the laws of any state or territory except the District of Colum-

bia, or by the Congress of the United States which shall have filed with the Secretary of the Interior a copy of its Articles of Incorporation and due proofs of its organization under the same to the extent of 100 feet on each side of the central line of the said road, also the right to take, from the public lands adjacent to the line of the said road, material, earth, stone and timber necessary for the construction of the said railroad; also ground adjacent to such right of way for station buildings, depots, machine-shops, sidetracks, turn-outs and water stations not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

The said act of Congress further provides that any railroad company desiring to secure the benefits of the said act, shall within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed land, and if upon unsurveyed land, within twelve months after the survey thereof by the United States, file with the Register of the land office for the District where said land is located a profile of its road, and upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office, and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way; provided, that if any section of such road shall not be completed within five years after the location

of such section, the rights granted by such act shall be forfeited as to any such uncompleted section of said road.

It is further provided in said act of Congress that the act shall not apply to any lands within the limits of any military, park, or Indian Reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty stipulation, or by act of Congress heretofore passed.

That at all the times hereinafter mentioned the said act of Congress was and is in full force and effect and unrepealed and reference is hereby made to the said Act of Congress at 18 Statute, page 482.

IV.

That in order to carry out the provisions of the said act of Congress, the Honorable Secretary of the Interior, from time to time made regulations concerning the procedure to be followed by any railroad company in obtaining a right of way as provided in said act over the public lands of the United States, and prior to the year 1899 ("Prior to the year" interlined, and by a circular of August 7, 1899, erased), adopted and promulgated such regulations, which were to be followed thereafter, and which provided among other things that any railroad desiring to obtain the benefits of the said act should file through the office of the Commissioner of the General Land Office, or the Register of the land district in which

the principal terminus of the road is to be located to be forwarded to the Secretary of the Interior;

First, a copy of its Articles of Incorporation duly certified to by the proper office of the company under its corporate seal or by the Secretary of the State or Territory were organized.

Second. A copy of the State or Territorial laws under which the company was organized, with the certificate of the Governor or Secretary of the State or Territory that the same is the existing law.

Third. When the said law directs that the Articles of Association or other papers connected with the organization be filed with any State or Territorial officer, the certificate of such officer that the same have been filed according to law with the date of the filing thereof.

The fourth rule relates to the acts of a company operating in another State or territory than that in which it is incorporated, and is not deemed pertinent to this suit.

Fifth. The official statement under the seal of the proper officer that the organization has been completed; that the company is fully authorized to proceed with the construction of the road according to the existing law of the State or Territory in which it is incorporated.

Sixth. An affidavit by the President under the seal of the company, showing the names and desig-

nations of its officers at the date of the filing of the proof.

Seventh. If certified copies of the existing laws regarding such corporations, and of new laws as passed from time to time be forwarded to the office of the Secretary of the Interior, by the Governor or Secretary of any State or territory, a company organized in such State or Territory may file, in lieu of the requirements of the second subdivision of this paragraph, a certificate of the governor or secretary of the State or Territory, that no change has been made since a given date, not later than that of the laws last forwarded.

It is further provided in the said regulations that if the lands which the said railroad is to traverse are located in more than one district, duplicate maps and field-notes need be filed in but one district, and single sets in the others.

It is further provided in said regulations that the said maps must be drawn on tracing linen in duplicate and must be strictly conformable to the field-notes of the survey of the line of route or of the station grounds, and that the field-notes of the survey shall be written along the line on the map, or if the map would thereby be too much crowded to be easily read, then duplicate field-notes shall be filed separate from the map in such form that they may be folded for filing, and that a sufficient number of stations

shall be shown on the map to make it convenient to follow the field-notes, and that the map shall show the lines of reference of initial and terminal points, with their courses and distances, and that public surveys represented on the map should have their entire boundaries drawn, and on all lands affected by the right of way. The smallest legal subdivision (40-acre tracts and lots) must be shown, and that the termini of the line of road should be fixed by reference by course and distance to the nearest existing corner of the public survey, and that the map, field-notes, engineer's affidavit and president's certificate, as provided in said regulations shall each show these connections, and that the company must certify that the road is to be operated as a common carrier of passengers and freight.

And that when the line of survey crosses a township or section line of the public survey the distance to the nearest existing corner shall be ascertained and noted, which the map and field-notes shall show at the points of intersection.

It is further provided that the engineer's affidavit and president's certificate required as aforesaid must be written on the map, and must both designate by termini and length in miles and decimals the line and route for which right of way application is made.

That appropriate forms are provided by the said regulations, to be followed. Reference is hereby made to the said regulations.

V.

That in pursuance of the said objects of its incorporation and for the purpose of obtaining a right of way over the public lands of the United States wherever its said railroad shall traverse the same, and in accordance with the terms of the said act of Congress, and the said regulations adopted in pursuance thereof, the complainant, the Columbia Valley Railroad Company, on the —— day of ————, 1899, duly filed with the Honorable Secretary of the Interior at Washington, in the District of Columbia, a copy of its Articles of Incorporation, and due proofs of its organization under the same, duly certified to by the President of the said complainant, under its corporate seal, together with a duly certified copy of the laws of the said State of Washington, under which said corporation was organized, in all respects as required by the said law and the said regulations, and the proper certificates of the officers of the said State of Washington as required by the said regulations, that the said articles had been filed with the said officer according to law, with the date of filing thereof, and that the organization of the said corporation had been completed, and that the company was fully authorized to proceed with the construction of its said road according to the existing law of the said state, and the affidavit by the said L. Gerlinger, who was then and there the President of the said corpora-

tion, showing the names and designations of its officers at the date of filing the said proofs, and in all respects conforming to the requirements of the said act of Congress and of the said regulation.

VI.

That thereupon and by virtue of the said act of Congress and of the said regulations, and of the compliance therewith by the complainant as aforesaid, the complainant, the Columbia Valley Railroad Company on the 27th day of December, 1899, became entitled to acquire a right of way over, through and across the public lands of the United States designated in said act along its said route of railroad, to consists of a strip of land to the extent of 100 feet in width on each side of the central line of its said railroad, through all public lands along said route as granted by said act of Congress, and to survey, locate, construct, operate and maintain its said railway across said lands over said right of way as aforesaid, and particularly through and over the public lands hereinafter more particularly described lying along the route of the said railroad.

VII.

That for the purpose of fixing, designing and locating its said right of way granted as aforesaid, the complainant, the Columbia Valley Railroad Company, caused the central line of its said railroad to

be definitely surveyed and located on the ground, beginning at a point at Station 4438-38 which is a point in the State of Washington, County of Yakima, directly opposite Wallula in the northwest quarter of section 21, township 7 north, of range 31 east, W. M., and is south 72 degrees 27 minutes west 5320 feet from the corner to sections 15, 16, 21 and 22, in the township and range aforesaid, and thence to station 3379-93, which is a point south 23 degrees 35 minutes west 2880 feet from the northeast corner of section 1, township 5 north, of range 28 E., W. M., a length of twenty miles, and continuing beginning at station 3379-93, which is a point south 23 degrees 35 minutes west 2880 feet from the northeast corner of section 1, township 5 north of range 28 E., W. M., thence to station 2322-98, which is a point south 16 degrees 10 minutes west 1955 feet from the quarter section corner to section 13, 14, township 5 N., R. 25 E., W. M., a length of twenty miles.

That the complainant began the survey and location on the ground of the said route of its railroad as aforesaid on the 22d day of April, 1899, and finished the survey and location of the first twenty miles thereof as aforesaid on the 6th day of May, 1899, and began the survey and location of the second twenty miles as aforesaid on the 6th day of May, 1899, and finished the same on the 15th day of May, 1899, and began the survey of the third section of twenty miles

on the 15th day of May, 1899, and finished the same on the 24th day of May, 1899, and began the survey of the fourth section of twenty miles thereof on the 24th day of May, 1899, and finished the same on the 6th day of June, 1899, and began the survey of the fifth section of twenty miles thereof on the 6th day of June, 1899, and finished the same on the 16th day of June, 1899, and began the survey of the sixth section of twenty miles thereof on the 16th day of June, 1899, and finished the same on the 29th day of June, 1899, and began the survey of the seventh section of twenty miles thereof on the 20th day of April, 1899, and finished the same on the 29th day of June, 1899, and began the eighth section on April 20th and finished same on June 27th, 1899.

That the said central line of the route of the said railroad as so surveyed was at the time of making such surveys marked upon the ground by stakes such as are usually employed by surveyors of railroad lines, driven in the ground at the end of each 100 feet of the said line commencing at the said beginning point described as aforesaid and extending thence along said surveyed route to the ending point of the first 20 miles, and from thence along said surveyed route to the end of the second 20 miles, and in the same manner to the end of the said seventh section thereof as aforesaid. Each of the said stakes represented a station of 100 feet, and each of the said

stakes was marked and numbered in the manner usual with surveyors of railroad lines, and the said central line of the rote of the said railroad as so surveyed and marked upon the ground in the usual and customary way of surveyors, surveying and locating the line of route of railroads, and the same at all times was then and has since been readily to be observed and traced upon the ground.

VIII.

That immediately after each of the said sections of twenty miles of the survey were made as aforesaid, the complainant caused correct maps or profiles thereof respectively to be made, and thereupon, J. W. Coovert, who was then and there the duly authorized and appointed chief engineer of the complainant, duly made his affidavit, which was then and there duly sworn and subscribed to before a notary public authorized to administer said oath, and which affidavit was written upon each of the said maps or profiles, and each of which affidavits designated by termini and length in miles and decimals, the line of route for said right of way as aforesaid, and each of which affidavits was to the effect that the said survey of the said line of railway described and surveyed as aforesaid, and appearing upon the said map way made by him as chief engineer of the said company, the complainant herein, and under its authority, and gave the date of the beginning and of the completion

of the said survey of section of twenty miles shown by the said map, and that the survey of the said line was accurately represented on each of the said maps and by the field-notes accompanying each of them, and the said affidavit which was written upon the map showing the eighth section of twenty miles of the said railroad described the beginning point of the said section as follows;

Beginning at station 931-47, which is a point 1226 feet south and 1955 feet west from the quarter section corner of sections 34 and 35, township 3 north, of range 11 east of the Willamette Meridian, to station 1987-38, which is a point 912 feet east and 1086 feet south of the quarter section to sections 27 and 28, township 3 N., R. 8 east of the Willamette Meridian, a length of twenty miles, and that the said survey was commenced on the 20th day of April, 1899, and ended on the 27th day of June, 1899, and that the survey of the said line is accurately represented on the said map and by the accompanying field-notes thereto.

That L. Gerlinger, who was then the president of the complainant corporation, duly made a certificate for each of the aforesaid maps, wherein he certified that he was the president of the complainant company; that, the said J. W. Coovert, who subscribed the affidavit accompanying each of the said maps, was the chief engineer of the said company; that

the survey of the said railroad as accurately represented on each of the said maps and by the field-notes thereof, was made under the authority of the company; that the company was duly authorized by its articles of incorporation to construct the said railroad upon the location shown upon the said maps; that the survey as represented on each of the said maps and field-notes thereof was adopted by resolution of its Board of Directors on a certain day in said certificate stated, as definite location of the said railroad, and which survey as to each map described the beginning and terminal points shown; and that each of the said maps had been prepared to be filed in order to obtain the benefits of the act of Congress approved March, 3, 1875, entitled "An act granting to the railroads the right of way through the public lands of the United States," and each of which said certificates further certify that the said railroad was to be operated as a common carrier of passengers, and each of which certificates was officially duly signed by said L. Gerlinger, as president of the said complainant company, and attested by George W. Stapleton, who was then and there the duly appointed and acting secretary of the said corporation, and which certificates respectively, were written upon each of the said maps respectively, and the said certificate written upon the eighth section thereof as aforesaid desig-

nated the 27th day of December, 1899, as the date when the said survey was adopted by the said Board of Directors as aforesaid.

That the said maps as aforesaid were made in all respects conformably to the regulations of the Secretary of the Interior hereinbefore described and referred to, and comformably to the field-notes of the survey of the line of the said route for the whole distance of the said 160 miles.

That the said J. W. Coovert, as chief engineer, in making the said surveys made accurate field-notes thereof so complete that the said line may be retraced from them on the ground to conform to the said regulations in every respect.

That the said maps and field-notes were each duly filed with the Board of Trustees of the complainant and duly aproved by the said Board of Trustees, and the said line of the said railroad as so designated and surveyed was duly adopted as the located line of the plaintiff for the purpose among other things of obtaining the benefits of the said act of Congress of March 3, 1875, hereinbefore mentioned, and the maps and field-notes of the eighth section thereof were approved and the line thereof located by the said Board of Trustees on the 27th day of December, 1899.

IX.

That thereafter the maps of the first, second,

third and fourth sections thereof were duly filed in the land office of the Walla Walla land district at Walla Walla, Washington, on the 21st day of March, 1900, and maps and field-notes of the fifth and sixth and seventh sections thereof were duly filed in the land office of the Vancouver Land District, at Vancouver, Washington, on the 19th day of October, 1900, and the maps and profiles of the eighth section thereof were duly filed in the land office of the Vancouver land district at Vancouver, Washington, on the 29th day of September, 1900, the said Walla Walla land district at Walla Walla, Washington, being the land district in which the land traversed by the line described in the maps so filed, was situated, and the Vancouver land district being the land district in which the land traversed by the line described in the maps so filed at Vancouver, was situated. And each of said maps were duly filed of record by the Register of the said land offices respectively, as required by the said act of Congress and the regulations thereunder, and have ever since remained and are now of record in said land offices.

That duplicates of each of the said maps were respectively transmitted to the Honorable Secretary of the Interior, immediately after the same were approved by the said Board of Trustees as aforesaid, and the said Honorable Secretary received and

filed the same as required by the said act of Congress, and the regulations of the said department described as aforesaid, and as to the said eighth section of the said land as aforesaid, the map thereof was duly approved by the said Honorable Secretary of the Interior at Washington, D. C., on the 29th day of September, 1900.

X.

That the said right of way (being 100 feet on each side of the central line thereof), and said line of railway as so surveyed and located and so designated upon the said maps as aforesaid traverse lot 1 in section 29 and lots 3 and 5 of section 30, township 3 north, of range 10 east of the Willamette Meridian, and lot 5 of section 25 and lot 1 of section 35, and lots 1, 2, 3 and 4 of sections 23, and lots 2, 3 and 4 of section 32, all in township 3 north, of range 9 east of the Willamette Meridian, and lot 4 of section 35 in township 3 north of range 8 east of the Willamette Meridian.

That at the time of the organization of the plaintiff, the making and filing of its articles of incorporation under the laws of the State of Washington, and at the date of the filing of the copy of its articles of incorporation, and the proofs of its organization under the same, with the Secretary of the Interior, and at the time of making the said surveys, maps and field-notes and at the time of ap-

proving the said maps and adopting the said line of railway as aforesaid by the Board of Directors of the plaintiff, as aforesaid, all of the above-described land and each and every subdivision thereof were public lands of the United States, and were not then or there within the limits of any military, park, or Indian Reservation and were not specially reserved from sale, and were and are subject to the grant made in the said act of Congress, on March 3, 1875, hereinbefore referred to.

XI.

That by reason of the premises this complainant, the Columbia Valley Railroad Company, prior to the 27th day of Dec., 1899, became and ever since has been and now is the owner of the right of way through all the public lands above-described traversed by the said railway to the extent of 100 feet on each side of the central line of its railroad as the same was so surveyed, located and adopted from the said point opposite Wallula to the said point described as the end of the survey of the said one hundred and sixty miles thereof.

XII.

That all the said steps taken as aforesaid by the plaintiff were taken in good faith for the purpose of constructing a railroad along the route described in its articles of incorporation, and the plaintiff at all times since its incorporation has been and is now

actively engaged in prosecuting the said enterprise, and desires and intends to construct with reasonable dispatch, and operate a railroad over said line described in its articles of incorporation, from a point near the mouth of the Columbia River for the carriage of freight and passengers in accordance with its articles of incorporation, and is in all respects conforming to and intends to conform to the provisions of the said act of Congress hereinbefore referred to, and the regulations of the said Secretary of the Interior relative to survey, location and construction of its said railroad.

XIII.

That about the day of 1905, the defendant, the Portland and Seattle Railway Company, through its officers, agents, servants and employees, wrongfully and without authority of law, or the consent of the plaintiff entered upon a part of the right of way hereinbefore described, which lays upon the public lands of the United States hereinbefore described, and particularly upon the following described parts thereof.

Lots 1, 2, 3 and 4 of section 33, and lots 2, 3 and 4 of section 32, in township 3 north, of range 9 east of the Willamette Meridian.

That the defendant has upon the last named premises sent its men, teams and apparatus and on the complainant's said line of railway as hereinbefore

described and is engaged in excavating the ground thereon, and making fills, cuts, and embankments with intent to construct and operate a line of railway over the complainant's said line of railway on the said premises, and the defendant intends and declares that it will continue the said work of constructing its said railway over and upon the said right of way of complainant from its beginning point to its ending point as hereinbefore described, over and across the said public lands as aforesaid, and has occupied and intends to occupy for the purpose of its said railroad the complainant's said right of way through its entire line as described in this bill of complaint.

That the defendant pretends to own and claims the right to occupy the complainant's said right of way for the construction of the defendant's road, and by its agents, servants, employees, contractors and subcontractors is continually trespassing upon the said right of way as aforesaid.

That unless the defendant shall be restrained and enjoined from continuing its said trespass as aforesaid, the complainant will be required to bring a multiplicity of suits against the defendant and against its several employees, servants and agents to prevent the said injury and the said wrongful acts and that the complainant's injury as aforesaid cannot be compensated in damages.

XIV.

And the complainant charges that the value of the said right of way over the lands herein described in township 3 north, of range 10 east, and township 3 north, of range 9 east, and township 3 north, of range 8 east, as aforesaid exceeds the sum of two thousand ($2,000.00) dollars, and the matter in dispute herein exceeds the sum of two thousand ($2,000.00) dollars, exclusive of interest and costs.

XV.

That complainant has no plain, speedy or adequate remedy at law.

XVI.

To the end that the complainant may obtain the relief to which it is entitled in the said cause, it now prays the Court to grant it due process by subpoena directed to the said Portland and Seattle Railway Company, defendant hereinbefore named, requiring it to appear herein and answer, but not under oath, the same being expressly waived, the several allegations in this, the complainant's contained, and that the said defendant, the Portland and Seattle Railway Company, and its servants, agents and employees and all others under or by its direction from entering upon any of the said land described in this bill in township 3 north, of range 10 east, and township 3 north of range 9 east, and township 3 north, of range 8 east of the Willamette Meridian,

within its said right of way, and from constructing any part of its said railway thereon, and from making any excavations or doing any of the things aforesaid, which obstruct, retard or prevent the complainant from using its said right of way and from constructing and operating its said line of railway as described in this bill of complaint, and that pending this suit, a preliminary injunction shall be granted against the defendant, the Portland and Seattle Railway Company enjoining and restraining the said defendant from doing any of the aforesaid acts, and that pending the decision upon the application for a preliminary injunction herein, that the Court may grant an order restraining the said acts until the decision upon the said motion, and for such other and further relief as to the Court may seem meet in equity, and for the complainant's costs and disbursements.

GEORGE W. STAPLETON,
Solicitor for the Complainant.

It is hereby consented that all papers subsequent hereto except writs and process may be served upon James P. Stapleton at his law office in the town of Vancouver, Washington.

GEORGE W. STAPLETON.

State of Oregon,
County of Multnomah,—ss.

I, L. Gerlinger, being first duly sworn, depose and say that I am the president of the plaintiff corporation; that I know the contents of the foregoing bill of complaint and the same is true as I verily believe.

L. GERLINGER.

Subscribed and sworn to before me this 1st day of February, 1906.

MARTIN L. PIPER,
Notary Public for Oregon.

[Endorsed]: Bill of Complaint. Filed in the U. S. Circuit Court, Western Dist. of Washington. Feb. 2, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

United States Circuit Court for the Western District of Washington.

No. 1384.

COLUMBIA VALLEY RAILROAD COMPANY,
Complainant,
vs.
THE PORTLAND AND SEATTLE RAILWAY COMPANY,
Defendant.

Appearance for Complainant.

To the Clerk of the Above-entitled Court:

You will please enter my appearance as solicitor for complainant in the above-entitled cause in the above-entitled court.

GEORGE W. STAPLETON,
Portland, Or.

[Endorsed]: Appearance. Filed Feb. 2, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Deputy Clerk.

Circuit Court of the United States for the Western District of Washington.

COLUMBIA VALLEY RAILROAD COMPANY,
Complainant,

vs.

THE PORTLAND AND SEATTLE RAILWAY COMPANY,
Defendant.

Demurrer to Bill of Complaint.

Comes now the defendant and demurs to the bill of complaint herein, and as grounds therefor specifies:

1. That said bill does not state facts which entitle the complainant to relief herein.

2. That this Court has no jurisdiction of the cause.

A. G. AVERY,
Solicitor for Defendant.

JAMES B. KERR,
of Counsel.

State of Washington,
County of King,—ss.

James B. Kerr being first duly sworn on oath says:

That he is an officer, to wit, assistant secretary of the defendant corporation above named, and is authorized to make, and makes this affidavit on its behalf; that the foregoing demurrer is not interposed for delay.

JAMES B. KERR.

Subscribed and sworn to before me this 22d day of February, 1906.

L. FRANK GORDON.
Notary Public in and for the State of Washington,
Residing at Seattle.

I, James B. Kerr, counsel for the defendant above named, hereby certify that the foregoing demurrer is in my opinion well taken in point of law.

JAMES B. KERR.

Papers in the above cause may be served upon the defendant, by delivering the same to the undersigned at the postoffice address given below.

JAMES B. KERR,
Vancouver, Clark County, Washington.

[Endorsed]: Demurrer. Filed in the U. S. Circuit Court, Western Dist. of Washington. Feb. 23, 1906. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep.

Circuit Court of the United States, Western District of Washington.

No. 1384.

COLUMBIA VALLEY RAILROAD COMPANY,
Complainant,

vs.

PORTLAND AND SEATTLE RAILWAY COMPANY,
Defendant.

Order Sustaining Demurrer to Bill of Complaint, etc.

This cause coming on to be heard upon the demurrer of the defendant to the bill of complaint herein, James B. Kerr appearing for the defendant in support of said demurrer, and Martin L. Pipes appearing for the complainant in opposition to said demurrer, and the Court being advised.

It is ordered that said demurrer be, and the same is hereby sustained.

It is further ordered that the complainant be allowed thirty days from this date within which to amend its bill of complaint.

Dated, February 23d, 1906, by the Court.

C. H. HANFORD,

Judge.

[Endorsed]: Order. Filed in the U. S. Circuit Court, Western Dist. of Washington. Feb. 23, 1906. A. Reeves Ayres, Clerk. H. M. Walthew, Dep.

In the Circuit Court of the United States for the Western District of Washington.

THE COLUMBIA VALLEY RAILROAD COMPANY (a Corporation),

Plaintiff,

vs.

THE PORTLAND AND SEATTLE RAILWAY COMPANY (a Corporation),

Defendant.

Amended Bill of Complaint.

The said complainant, the Columbia Valley Railroad Company, complains against the said defendant by this, its amended bill of complaint, and alleges the following facts, to wit:

I.

That said complainant, the Columbia Valley Railroad Company, now is and ever since the 16th day of February, 1899, has been a corporation duly organized and existing under the laws of the State of Washington, for the purpose of building, equipping, operating or acquiring a railroad and telegraph line from Wallula on the south bank of the Columbia River in the State of Washington, thence across the Columbia River at a point at or near Wallula, and thence by some eligible route along the north bank of the Columbia River to a point in the State of Washington on the Columbia River, at or near the mouth of the said river, and to maintain, operate, lease, construct or acquire the said railroad or telegraph line or lines, to carry freight or passengers thereon and transmit messages thereover, and to receive tolls for the carriage and transmission of the said, and to do all things necessary or proper for the accomplishment of the objects as specified in its articles of incorporation.

II.

That the defendant is a corporation organized under and in pursuance to the laws of the State of Washington, for the purpose of constructing and operating a railroad.

III.

That the complainant claims the right of way here-

inafter described over the public lands of the United States hereinafter described under and by virtue of the provisions of the act of Congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States."

That the said act of Congress among other things provides that the right of way through the public lands of the United States is thereby granted to any railroad company duly organized under the laws of any state or territory except the District of Columbia, or by the Congress of the United States which shall have filed with the Secretary of the Interior a copy of its Articles of Incorporation and due proofs of its organization under the same to the extent of 100 feet on each side of the central line of the said road, also the right to take, from the public lands adjacent to the line of the said road material, earth, stone, and timber necessary for the construction of the said railroad; also ground adjacent to such right of way for station buildings, depots, machine-shops, side-tracks, turn-outs and water stations not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

The said act of Congress further provides that any railroad company desiring to secure the benefits of the said act, shall within twelve months after the location of any section of twenty miles of its road, if

the same be upon surveyed land, and if upon unsurveyed land, within twelve months after the survey thereof by the United States, file with the Register of the land office for the district where said land is located a profile map of its road, and upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office, and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way; provided, that if any section of such road shall not be completed within five years after the location of such section, the rights granted by such act shall be forfeited as to any such uncompleted section of said road.

It is further provided in said act of Congress that the act shall not apply to any lands within the limits of any military park, or Indian Reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty stipulation, or by act of Congress heretofore passed.

That at all the times hereinafter mentioned the said act of Congress was and is in full force and effect and unrepealed and reference is hereby made to the said Act of Congress at 18b Statute, page 482.

IV.

That in order to carry out the provisions of the said act of Congress, the Honorable Secretary of the

Interior, from time to time made regulations concerning the procedure to be followed by any railroad company in obtaining a right of way as provided in said act over the public lands of the United States, and on the 4th day of November, 1899, and by a circular of Augut 7th, 1899, adopted and promulgated such regulations, which were to be followed thereafter, and which provided among other things that any railroad desiring to obtain the benefits of such act should file through the office of the Commission of the General Land Office, or the Register of the land district in which the principal terminus of the road is to be located to be forwarded to the Secretary of Interior;

First. A copy of its articles of incorporation duly certified to by the proper officer of the company under its corporate seal or by the Secretary of the State or Territory where organized.

Second. A copy of the State or Territorial laws under which the company was organized, with the certificate of the Governor or Secretary of the State or Territory that the same is the existing law.

Third. When the said law directs that the Articles of Association or other papers connected with the organization be filed with any State or Territorial officer, the certificate of such officer that the same have been filed according to law with the date of the filing thereof.

The fourth rule relates to the acts of a company operating in another state or territory than that in which it is incorporated, and is not deemed pertinent to this suit.

Fifth. The official statement under the seal of the proper officer that the organization has been completed; that the company is fully authorized to proceed with the construction of the road according to the existing law of the State or Territory in which it is incorporated.

Sixth. An affidavit by the President under the seal of the company, showing the names and designations of its officers at the date of filing of the proof.

Seventh. If certified copies of the existing laws regarding such corporations, and of new laws as passed from time to time be forwarded to the office of the Secretary of the Interior, by the Governor or Secretary of any State or Territory, a company organized in such State or Territory may file, in lieu of the requirements of the second subdivision of this paragraph, a certificate of the Governor or Secretary of the State or Territory, that no change has been made since a given date, not later than that of the laws last forwarded.

It is further provided in the said regulations that if the lands which the railroad is to traverse are located in more than one district duplicate maps and

field-notes need be filed in but one district, and single sets in the others.

It is further provided in said regulations that the said maps must be drawn on tracing linen in duplicate and must be strictly conformable to the field-notes of the survey of the line of route or of the station grounds, and that the field-notes of the survey shall be written along the line on the map, or if the map would thereby be too much crowded to be easily read, then duplicate field notes shall be filed separate from the map, in such form that they may be folded for filing, and that a sufficient number of stations shall be shown on the map to make it convenient to follow the field-notes and that the map shall show the lines of reference of initial and terminal points, with their courses and distances, and that public surveys represented on the map should have their entire boundaries drawn, and on all lands affected by the right of way. The smallest legal subdivision (40-acre tracts and lots) must be shown, and that the termini of the line of road should be fixed by reference by course and distance to the nearest existing corner of the public survey, and that the map, field-notes, engineer's affidavit and president's certificate, as provided in said regulations shall each show these connections, and that the company must certify that the road is to be operated as a common carrier of passengers and freight.

And that when the line of survey crosses a township or section line of the public survey, the distance to the nearest existing corner shall be ascertained and noted, which the map and field-notes shall show at the points of intersection.

It is further provided that the engineer's affidavit and president's certificate required as aforesaid must be written on the map, and must both desiginate by termini and length in miles and decimals the line and route for which right of way application is made.

That appropriate forms are provided by the said regulations to be followed. Reference is hereby made to the said regulations.

V.

That in pursuance of the said objects of its incorporation and for the purpose of obtaining a right of way over the public lands of the United States wherever its said railroad shall traverse the same, and in accordance with the terms of the said Act of Congress, and the said regulations adopted in pursuance thereof, the complainant, the Columbia Valley Railroad Company, on the —— day of ————, 1899, duly filed with the Honorable Secretary of the Interior at Washington, in the District of Columbia, a copy of its Articles of Incorporation, and due proofs of its organization under the same, duly certified to by the President of the said complaint, under its

corporate seal, together with a duly certified copy of the laws of the said State of Washington, under which said corporation was organized, in all respects as required by the said law and the said regulations, and the proper certificates of the officers of the said State of Washington as required by the said regulations, that the said articles had been filed with the said officer according to law, with the date of filing thereof, and that the organization of the said corporation had been completed, and that the company was fully authorized to proceed with the construction of its said road according to the existing laws of the said State, and the affidavit by the said L. Gerlinger, who was then and there the President of the said corporation, showing the names and designations of the its officers at the date of filing the said proofs, and in all respects conforming to the requirements of the said act of Congress and of the said regulation.

VI.

That thereupon and by virtue of the said act of Congress and of the said regulations, and of the compliance therewith by the complainant, the Columbia Valley Railroad Company on the 27th day of December,1899, became entitled to acquire a right of way over, through and across the public lands of the United States designated in said act along its said route of railroad, to consist of a strip of land to the extent of 100 feet in width on each side of the central

line of its said railroad, through all public lands along said route as granted by said act of Congress, and to survey, locate, construct, operate and maintain its said railway across said lands over said right of way as aforesaid, and particularly through and over the public lands hereinafter more particularly described lying along the route of the said railroad.

VII.

That for the purpose of fixing, designating and locating its said right of way granted as aforesaid, the complainant, the Columbia Valley Railroad Company, caused the central line of its said railroad to be definitely surveyed and located on the ground beginning at a point at Station 4438-38, which is a point in the State of Washington, County of Yakima, directly opposite Wallula in the northwest quarter of the section 21, township 7 north, of range 31 east, W. M. and is south 72 degrees 27 minutes west 5320 feet from the corner to sections 15, 16, 21 and 22 in the township and range aforesaid, and thence to station 3379-93, which is a point south 23 degrees 35 minutes west 2880 feet from the northeast corner of section 1, township 5 north, of range 28 E., W. M., a length of twenty miles, and continuing beginning at station 3379-93, which is a point south 23 degrees 35 minutes west 2880 feet from the northeast corner of section 1, township 5 north, of range 28 E., W. M., thence to station 2522-98, which is a point south 16

degrees 10 minutes west 1955 feet from the quarter section corner to sections 13 and 14, township 5 N., R. 25 E., W. M., a length of twenty miles.

That the complainant began the survey and location on the ground of the said route of its railroad as aforesaid on the 22d day of April, 1899, and finished the survey and location of the first twenty miles thereof as aforesaid on the 6th day of May, 1899, and began the survey and location of the second twenty miles as aforesaid on the 6th day of May, 1899 and finished the same on the 15th day of May, 1899, and began the survey of the third section of twenty miles on the 15th day of May, 1899, and finished the same on the 24th day of May, 1899, and began the survey of the fourth section of twenty miles thereof on the 24th day of May, 1899, and finished the same on the 6th day of June, 1899, and began the survey of the fifth section of twenty miles thereof on the 6th day of June, 1899, and finished the same on the 16th day of June, 1899, and began the survey of the sixth section of twenty miles thereof on the 16th day of June, 1899, and finished the same on the 29th day of June, 1899, and began the survey of the seventh section of twenty miles thereof on the 20th day of April, 1899, and finished the same on the 29th day of June, 1899, and began the survey of the eighth section on April 20th, 1899, and finished the same on June 27, 1899.

That the said central line of the route of the said railroad as so surveyed was at the time of making such surveys marked upon the ground by stakes such as are usually employed by the surveyors of railroad lines, driven in the ground at the end of each 100 feet of the said line commencing at the said beginning point described as aforesaid and extending thence along said surveyed route to the ending point of the first 20 miles, and from thence along said surveyed route to the end of the second 20 miles, and in the same manner to the end of the said seventh section thereof as aforesaid. Each of the said stakes represented a station of 100 feet, and each of the said stakes was marked and numbered in the manner usual with surveyors of railroad lines, and the said central line of the route of the said railroad as so surveyed and marked upon the ground in the usual and customary way of surveyors, surveying and locating the line of route of railroads, and the same at all times was then and has since been readily to be observed and traced upon the ground.

VIII.

That immediately after each of the said sections of twenty miles of the survey were made as aforesaid, the complainant caused correct maps or profiles thereof respectively to be made, and thereupon, J. W. Coovert, who was then and there the duly authorized and appointed chief engineer of the com-

plainant, duly made his affidavit, which was then and there duly sworn and subscribed to before a notary public authorized to administer said oath, and which affidavit was written upon each of the said maps or profiles, and each of which affidavits designated by termini and length in miles and decimals, the line of route for said right of way as aforesaid, and each of which affidavits was to the effect that the said survey of the said line of railway described and surveyed as aforesaid, and appearing upon the said map was made by him as chief engineer of the said company, the complainant herein, and under its authority, and gave the date of the beginning and of the completion of the said survey of the section of twenty miles shown by the said map, and that the survey of the said line was accurately represented on each of the said maps and by the field-notes accompanying each of them and the said affidavit which was written upon the map showing the eighth section of twenty miles of the said railroad described the beginning point of the said section as follows:

Beginning at Station 931—47, which is a point 1226 feet south and 1955 feet west from the quarter section corner to sections 34 and 35, township 3 north, of range 11 east of the Willamette Meridian, to station 1987—38, which is a point 912 feet east and 1086 feet south of the quarter section to sec-

tions 27 and 28, township 3 N., R. 8 east, of the Willamette Meridian a length of twenty miles, and that the said survey was commenced on the 20th day of April, 1899, and ended on the 27th day of June, 1899. and that the survey of the said line is accurately represented on the said map and by the accompanying field-notes thereto.

That L. Gerlinger, who was then the president of the complainant corporation, duly made a certificate for each of the aforesaid maps, wherein he certified that he was the president of the complainant company; that the said J. W. Coovert, who subscribed the affidavit accompanying each of the said maps was the chief engineer of the said company; that the survey of the said railroad as accurately represented on each of the said maps and by the field-notes thereof, was made under the authority of the company; that the company was duly authorized by its articles of incorporation to construct the said railroad upon the location shown upon the said maps; that the survey as represented on each of the said maps and field-notes thereof was adopted by resolution of its Board of Directors on a certain day in said certificate stated, as the definite location of the said railroad, and which survey as to each map described the beginning and terminal points shown; and that each of the said maps had been prepared to be filed in order to ob-

tain the benefits of the act of Congress approved March 3, 1875, entitled "An act granting to the railroads the right of way through the public lands of the United States," and each of which said certificates further certify that the said railroad was to be operated as a common carrier of passengers, and each of which certificates was officially duly signed by said L. Gerlinger, as president of the complainant company, and attested by George W. Stapleton, who was then and there the duly appointed and acting secretary of the said corporation, and which certificates respectively, were written upon each of the said maps respectively, and the said certificate written upon the eighth section thereof as aforesaid designated the 27th day of December, 1899, as the date when the said survey was adopted by the said Board of Directors as aforesaid.

That the said maps as aforesaid were made in all respects conformably to the regulations of the Secretary of the Interior hereinbefore described and referred to, and conformably to the field-notes of the survey of the line of the said route for the whole distance of the said 160 miles.

That the said J. W. Coovert, as chief engineer, in making the said surveys made accurate field-notes thereof so complete that the said line may be retraced from them on the ground to conform to the said regulations in every respect.

That the said maps and field-notes were each duly filed with the Board of Trustees of the complainant and duly approved by the said Board of Trustees and the said line of the said railroad as so designated and surveyed was duly adopted as the located line of the plaintiff for the purpose among other things of obtaining the benefits of the said act of Congress of March 3, 1875, hereinbefore mentioned, and the maps and field-notes of the eighth section thereof were approved and the line thereof located by the said Board of Trustees on the 27th day of December, 1899.

IX.

That thereafter the maps of the first, second, third and fourth sections thereof were duly filed in the land office of the Walla Walla land district at Walla Walla, Washington, on the 21st day of March, 1900, and the maps and field-notes of the fifth, sixth and seventh sections thereof were duly filed in the land office of the Vancouver Land District, at Vancouver, Washington, on the 19th day of October, 1900, and the maps and profiles of the eighth section thereof were duly filed in the land office of the Vancouver land district at Vancouver, Washington, on the 29th day of December, 1900, the said Walla Walla land district at Walla Walla, Washington, being the land district in which the land traversed by the line described in the maps so filed was situated, and the

Vancouver land district being the land district in which the land traversed by the line described in the maps so filed at Vancouver was situated. And each of said maps were duly filed of record by the register of the said land offices respectively, as required by the said act of Congress and the regulations thereunder, and have ever since remained and are now of record in said land office.

That duplicates of each of the said maps were respectively transmitted to the Honorable Secretary of the Interior immediately after the same were approved by the said Board of Trustees as aforesaid, and the said Honorable Secretary received and filed the same as required by the said act of Congress and the regulation of the said department described as aforesaid, and as to the said eighth section of the said land as aforesaid, the map thereof was duly approved by the said Honorable Secretary of the Interior at Washington, D. C., on the 29th day of September, 1900.

X.

That the said right of way (being 100 feet on each side of the central line thereof) and said line of railway as so surveyed and located and so designated upon the said maps as aforesaid traverse lot 1 in section 29 and lots 3 and 5 of section 30, township 3 north of range 10 east of the Willamette meridian, and lot 5 of section 25, and lot 1 of section 35,

and lots 1, 2, 3 and 4 of section 23, and lots 2, 3 and 4 of section 32, all in township 3 north, of range 9 east of the Willamette meridian, and lot 4 of section 35 in township 3 north of range 8 east of the Willamette meridian.

That at the time of the organization of the plaintiff, the making and filing of its Articles of Incorporation under the laws of the State of Washington, and at the date of the filing of the copy of its articles of incorporation, and the proofs of its organization under the same, with the Secretary of the Interior, and at the time of making the said surveys, maps and field-notes, and at the time of approving the said maps and adopting the said line of railway as aforesaid by the Board of Directors of the plaintiff, as aforesaid, all of the above described land and each and every subdivision thereof were public lands of the United States, and were not then or there within the limits of any military park or Indian reservation, and were not specially reserved from sale, and were and are subject to the grant made in the said act of Congress on March 3, 1875, hereinbefore referred to.

XI.

That by reason of the premises this complainant, the Columbia Valley Railroad Company, prior to the 27th day of December, 1899, became and ever since has been and now is the owner of the right of

way through all the public lands above described traversed by the said railway to the extent of 100 feet on each side of the central line of its said railroad as the same was so surveyed, located and adopted from the said point opposite Wallula to the said point described as the end of the survey of the said one hundred and sixty miles thereof.

XII.

That all the said steps taken as aforesaid by the plaintiff were taken in good faith for the purpose of constructing a railroad along the route described in its articles of incorporation, and the plaintiff at all times since its incorporation has been and now is actively engaged in prosecuting the said enterprise, and desires and intends to construct with reasonable dispatch, and operate a railroad over said line described in its articles of incorporation, from a point opposite Wallula to a point near the mouth of the Columbia River for carriage of freight and passengers in accordance with its articles of incorporation, and is in all respects conforming to and intends to conform to the provisions of the said act of Congress hereinbefore referred to, and the regulations of the said Secretary of the Interior relative to survey, location and construction of its said railroad.

XIII.

That about the —— day of ————, the defend-

ant, the Portland and Seattle Railway Company, through its officers, agents, servants and employees, wrongfully and without authority of law, or the consent of the plaintiff entered upon a part of the right of way hereinbefore described, which lays upon the public lands of the United States hereinbefore described, and particularly upon the following described parts thereof.

Lots 1, 2, 3 and 4 of section 33, and lots 2, 3 and 4 of section 32, in township 3 north of range 9 east of the Willamette Meridian.

That the defendant has upon the last-named premises sent its men, teams and apparatus, and on the complainant's said line of railway as hereinbefore described and is engaged in excavating the ground thereon, and making fills, cuts and embankments with intent to construct and operate a line of railway over the complainants' said line of railway on the said premises, and the defendant intends and declares that it will continue the said work of constructing its said railway over and upon the said right of way of complainant from its beginning point to its ending point as hereinbefore described, over and across the said public lands as aforesaid, and has occupied and intends to occupy for the purpose of its said railroad the complainant's said right of way through its entire line as described in this bill of complaint.

That the defendant disputes the right and title of the plaintiff to the right of way hereinbefore described over the public lands hereinbefore described, upon the ground that more than five years have elapsed since the location of the said eighth section of twenty miles of the plaintiff's said road as aforesaid, and that the said eighth section of the said railroad has not been completed within five years from the said location, and claims and pretends that under and by virtue of the provisions of the said act of March 3, 1875, the right and title of the plaintiff to the right of way over the said public lands hereinbefore described were and are forfeited as to the said section of said road, and claims the said alleged forfeiture under and by virtue of the provisions of section 4 of the said act of March 3, 1875, which is to the effect that if any section of the said road shall not be completed within five years after the location of the section, the rights herein granted shall be forfeited as to any such uncompleted section of said road; and the defendant pretends and claims that by virtue of the said provisions, the failure of the plaintiff to complete the said section within the said five years of itself and without any judicial proceeding or Congressional action works such forfeiture.

The defendant further pretends and claims the right to go upon the plaintiff's said right of way

and to build its said road thereon by virtue of the various acts of Congress.

It claims a right paramount to the plaintiff's right to enter upon and construct its road over lot 5 of section 25, lot 1 of section 32, in township 3 N., R. 9 east of the Willamette Meridian, and lot 4 in section 35, Tp. 3 north, range 8 east of the Willamette Meridian, under and by virtue of the act of Congress of date July 1, 1898, which act, among other things, in substance and effect granted to the Northern Pacific Railroad Company, or its lawful successors, the right upon the relinquishment of other lands within the grant of the said Northern Pacific Railroad Company, to select in lieu of the land relinquished, and equal quantity of certain public lands, surveyed or unsurveyed, not mineral or reserve, and not valuable for stone, iron or coal and free from valid adverse claim and not occupied by settlers at the time of such location, situated in any State or Territory into which the said railroad grant extended; and among other things the said grant provided in section 1 thereof "that the Secretary of the Interior shall from time to time ascertain, and as soon as conveniently may be done cause to be prepared and delivered to the said railroad or its successor in interest a list or lists of the several tracts which had been purchased or settled upon or occupied, and which were claimed by purchasers or occupants.

And the defendant pretends and claims that the said Secretary of the Interior, in pursuance of the said act, made a list, which is Number 181, and which was filed September 5, 1905, and which included the land hereinbefore last described, and under and in pursuance of the said act of Congress of July 1, 1898, the said Northern Pacific Railway Company, which the defendant claims was a lawful successor of the Northern Pacific Railroad Company, became and was entitled to own and possess the said land, and the defendant claims that the said Northern Pacific Railway Company has conveyed to the defendant its said rights in the premises, and that its said right to enter upon the said land and construct its line is paramount and superior to the plaintiff's said right of way.

The defendant claims the right to go upon and occupy lot 1 of section 29, township 3 north, range 10 east of the Willamette Meridian, under and by virtue of an act of Congress of June 3, 1878, commonly called the timber and stone act; and pretends and claims that one Heinrich Kapp, by compliance with the terms of the said act became the owner of the said land long subsequent to the time of the location of the plaintiff's line as aforesaid, and that the said Heinrich Kapp by some contract or agreement has granted to the defendant the right to go upon the said land and do the acts of which this plaintiff com-

plains as aforesaid. And the defendants claim the right to go upon lots 4 and 5 of section 30 of the said township and range under and by virtue of the homestead laws of Congress and claim that the said Heinrich Kapp filed a homestead thereon on the 28th day of December, 1903, and has since deeded to the defendant the said lots.

The plaintiffs allege that the defendants claimed the right to go upon lots 1 and 2 of section 34, township 3 north, range 9 east of the Willamette Meridian, and construct its line of railway as aforesaid by virtue of the homestead laws of the act of Congress, and claimed and pretend that at the time of the location of the plaintiff's line as aforesaid one, Samuel Martin, claimed a homestead on said lots, but that said homestead was canceled March 23, 1901, and that defendant claims that under the said acts of Congress plaintiff has no right of way on the lots in said section 34.

The defendant pretends and claims the right to enter upon and hold lots 1, 2, 3 and 4 in section 3, township 3 north, of range 9 east of the Willamette Meridian under an act of Congress called the homestead act, and that Paul Paulson filed a homestead on the said lots on August 11th, 1905, and has contracted with the defendant to give it the right of way occupied by plaintiff's right of way over the said lots.

The defendants claim the right to go upon lot 2 of section 32, township 3 north, of range 9 east of the Willamette Meridian under the said timber and stone act hereinbefore referred to, of June 3, 1878, and claims that A. Fleischhauer made an application under said act for said land, dated April 22, 1903, and became entitled to the possession of the said land and has contracted with the defendants for its pretended right of way as aforesaid.

And the defendant claims the right to go upon lot 4 of section 32, township 3 north, of range 9 east of the Willamette Meridian under the homestead act of Congress, and claims that Paul Paulson, under the terms of the said act became and was entitled to the said lot 4 as a homestead, on the 11th day of August, 1905, and has conveyed to the defendant the right to go upon the plaintiff's right of way as aforesaid.

The defendant claims the right to enter upon plaintiff's right of way in lots 3 and 4 of section 35, township 3 north, of range 8 east of the Willamette Meridian, under and by virtue of the homestead act of Congress, and pretends and claims that Thomas Menice had a homestead at the time of the plaintiff's location of its said right of way, which subsequently relinquished by him, and that by virtue of said act, that plaintiffs have no right of way over the said lots.

That the defendant makes no pretense or claim controverting the plaintiffs' right and title to its said right of way, or maintaining its own right and title to the said right of way or to justify the said acts of trespass except rights that arise under the said several acts of Congress, and that in determining the respective rights of the plaintiff and the defendant in and to the said land and their priorities it will be necessary for this Court to consider, construe and apply the said acts of Congress, and the said act of Congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States."

That the defendant pretends to own and claims the right to occupy the complainant's said right of way for the construction of the defendant's road, and by its agents, servants and employees, contractors and subcontractors is continually trespassing upon the said right of way as aforesaid.

That unless the defendant shall be restrained and enjoined from continuing its said trespass as aforesaid the complainant will be required to bring a multiplicity of suits against the defendant and against its several employees, servants and agents to prevent the said injury and the said wrongful acts and that the complainant's injury cannot be compensated in damages.

XIV.

And the complainant charges that the value of the said right of way over the lands herein described in township 3 north of range 10 east, and township 3 north of range 9 east, and township 3 north of range 8 east, as aforesaid, exceeds the sum of two thousand ($2,000.00) dollars, and the amount in dispute herein exceeds the sum of two thousand ($2,000.00) dollars exclusive of interest and costs.

XV.

That complainant has no plain, speedy or adequate remedy at law.

XVI.

To the end that the complainant may obtain the relief to which it is entitled in the said case, it now prays the Court to grant it due process by subpoena directed to the said Portland and Seattle Railway Company, defendant hereinbefore named, requiring it to appear herein and answer, but not under oath, the same being expressly waived, the several allegations in this, the complainant's amended bill contained, and that the said defendant, the Portland and Seattle Railway Company, and its servants, agents, and employees, and all others under or by its direction from entering upon any of the said land described in this amended bill in township 3 north of range 10 east, and township 3 north of range 9

east, and township 3 north of range 8 east of the Willamette Meridian, within its said right of way, and from constructing any part of its said railway thereon, and from making any excavations or doing any of the things aforesaid, which obstruct, retard or prevent the complainant from using its said right of way and from constructing and operating its said line of railway as described in this bill of complaint, and that pending this suit, a preliminary injunction shall be granted against the defendant, the Portland and Seattle Railway Company, enjoining and restraining the said defendant from doing any of the aforesaid acts, and that pending the decision upon the application for a preliminary injunction herein that the Court may grant an order restraining the said acts until the decision upon the said motion, and for such other and further relief as to the Court may seem meet in equity, and for the complainant's costs and disbursements.

MARTIN L. PIPES,
GEORGE W. STAPLETON,
Solicitors for the Complainant.

State of Oregon,
County of Multnomah,—ss.

I, L. Gerlinger, being first duly sworn, depose and say that I am the president of the complainant, in

the above-entitled suit; and that the foregoing amended bill of complaint is true as I verily believe.

L. GERLINGER.

Subscribed and sworn to before me this 23 day of March, 1906.

[Seal] MARTIN L. PIPES,
Notary Public for the State of Oregon.

State of Washington,
County of Clarke,—ss.

Due service of the within amended bill of complaint is hereby accepted in Clarke County, Washington, this 24th day of March, 1906, by receiving a copy thereof, duly certified to as such by Martin L. Pipes, attorney for complainant.

JAMES B. KERR,
Attorney for Defendant.

[Endorsed]: Amended Bill of Complaint. Filed Mar. 28, 1906. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

In the Circuit Court of the United States for Western District of Washington.

THE COLUMBIA VALLEY RAILROAD COMPANY (a Corporation),

Complainant,

vs.

THE PORTLAND AND SEATTLE RAILWAY COMPANY (a Corporation),

Defendant.

Demurrer to Amended Bill of Complaint.

Comes now the defendant above named and demurs to the amended bill of complaint of the complainant herein, and as ground for said demurrer says:

That the court above named has no jurisdiction of the matters and things set out in said amended bill of complaint and prays that said amended bill of complaint may be dismissed.

PORTLAND AND SEATTLE RAILWAY COMPANY,

By JAMES B. KERR,

Its Solicitor.

State of Washington,
County of Clarke,—ss.

James B. Kerr, being first duly sworn, on oath says that he is an officer, to wit, the assistant secretary of the defendant corporation above named. That the foregoing demurrer is interposed in good faith and not for the purposes of delay.

JAMES B. KERR.

Subscribed and sworn to before me this 30th day of March, 1906.

A. L. MILLER,
Notary Public in and for said County and State Residing at Vancouver.

I, James B. Kerr, counsel for defendant above named, hereby certify that the foregoing demurrer is in my opinion well taken in point of law.

JAMES B. KERR.

[Endorsed]: Demurrer. Filed in the U. S. Circuit Court, Western Dist. of Washington. Apr. 2, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

In the Circuit Court of the United States for the Western District of Washington, for the —— Division Thereof.

THE COLUMBIA VALLEY RAILROAD COMPANY (a Corporation),

Complainant,

vs.

THE PORTLAND AND SEATTLE RAILWAY COMPANY (a Corporation),

Defendant.

Supplemental Bill in Equity.

To the Judges of the Circuit Court of the United States for the Western District of Washington for the ——— Division thereof.

Comes now the complainant in the above-entitled suit, by this its supplemental bill, and respectfully shows:

I.

That heretofore, to wit, on the 2d day of February, 1906, complainant filed its original bill herein against the above-named defendant, and that due process by subpoena addressed and directed to the said defendants, requiring the said defendant to appear and answer was duly and regularly issued and served, and that thereafter the defendant did ap-

pear and plead to complainant's said bill. Thereafter complainant, by leave of Court first had and obtained, filed its amended bill against the hereinbefore mentioned defendant; and thereafter, the defendant filed its pleading to the said amended bill, upon which the same is now pending in this court.

II.

That subsequent to the filing of the original and amended bill of the complainant in this court, and subsequent to the appearance of the defendant and the filing of the pleadings to the said original and amended bill by the defendant herein, and during the time of the pendency of this cause in this court, to wit, on the 10th day of July, 1906, the said defendant did file in the Superior Court of the State of Washington, in and for the County of Skamania, a suit against the complainant herein, and the Wallula Pacific Railroad Company, a corporation, as defendant, which said suit is entitled the Portland and Seattle Railway Company, a Corporation, Plaintiff, versus The Columbia Valley Railroad Company, a Corporation, and The Wallula Pacific Railroad Company, a Corporation, Defendants, a copy of which complaint so filed by the defendants herein against the complainant, and the said Wallula Pacific Railroad Company, as defendants, is hereto attached, marked Exhibit "A," and made part hereof; that process due and regular was issued, and upon the

11th day of July, 1906, was duly served upon the complainant and the Wallula Pacific Railroad Company, named therein as defendants, requiring the said defendants therein named to appear within twenty days after the service of the summons, exclusive of the day of service, and to defend the said action in the Superior Court of the State of Washington, in and for the County of Skamania, and upon failure so to do, judgment would be rendered against said defendants therein named according to the demands of the complaint, a copy of which was served upon complainant and the Wallula Pacific Railroad Company, as defendants therein.

III.

That the question involved in the said action instituted in the said Superior Court of the State of Washington in and for the County of Skamania, hereinbefore referred to, and the controversy between the parties thereto, and the question presented for adjudication is of the same subject matter involved in the case now pending in this court in this suit, and relates to the same right of way and the same parties, and particularly describes and refers to a portion of the same property, and to allow, or to permit the said action filed by the defendant against the said complainant and the said Wallula Pacific Railroad Company as defendants, in the Superior court of the State of Washington, in and for

the County of Skamania, to continue, or to further proceed, would affect, impair or defeat the jurisdiction of this Court in this suit, and would prevent, impair and embarrass the carrying into full force and effect any and all judgments, decrees, rules or orders made by this Court in this proceeding; and the defendant threatens, and will, unless restrained by this Court, proceed with the said case hereinbefore referred to and filed in the Superior Court of the State of Washington in and for the County of Skamania, thus seriously and substantially affecting, impairing and defeating the jurisdiction of this Court, and defeat the carrying into full force and effect the orders, rules, judgments and decrees made, or to be made by this Court herein.

Wherefore, to the end that the jurisdiction of this Court may be preserved and protected, that its orders, rules, judgments and decrees may have and possess full force and effect, and that the complainant may have and receive that full relief to which it is entitled, it now prays that this Court require the defendant to answer herein, but not under oath, the same being expressly waived, the several allegations in this supplemental bill contained, and that this Court issue and grant an injunction against the defendant, the Portland and Seattle Railway Company, its officers, agents and employees, enjoining and restraining the said defendant, its officers,

agents and employees from instituting in any other court of the United States, or any state court, any suit, action or proceeding which in any manner or matter affects the subject of this controversy, or any of the questions herein presented for adjudication, and that the said defendant, its officers, agents and employees be especially and particularly enjoined and restrained from further, or at all, proceeding with the case which it instituted in the Superior Court of the State of Washington, in and for the County of Skamania, against the complainant herein and the Wallula Pacific Railroad Company as defendants, herein before referred to, during the pendency of this suit, and for such relief as is prayed in complainant's amended bill, and for such other and further relief as to the Court may seem just, meet and equitable.

W. W. COTTON,
ARTHUR C. SPENCER,
COOVERT & STAPLETON,
RALPH E. MOODY,
Solicitors for Complainant.

In the Superior Court of the State of Washington, for the County of Skamania.

PORTLAND AND SEATTLE RAILWAY COMPANY (a Corporation),

Plaintiff,

vs.

COLUMBIA VALLEY RAILROAD COMPANY (a Corporation), and the WALLULA PACIFIC RAILROAD COMPANY, (a Corporation).

Defendants.

Exhibit "A" to Supplemental Bill in Equity.

The State of Washington, to the said Defendants.

Your are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid; and in case of your failure so to do judgment will be rendered against you, according to the demand of the complaint, copy of which is herewith served upon you.

JAMES B. KERR,
GEO. T. REID,
Attorneys for Plaintiff.

P. O. Address, Vancouver, Clarke County, Washington.

In the Superior Court of the State of Washington, for the County of Skamania.

PORTLAND AND SEATTLE RAILWAY COMPANY (a Corporation),

Plaintiff,

vs.

COLUMBIA VALLEY RAILROAD COMPANY (a Corporation), and the WALLULA PACIFIC RAILROAD COMPANY (a Corporation),

Defendants.

To the Honorable Judge of the Above-named Court:

The above-named plaintiff for its cause of action against the defendants above-named shows to the court as follows:

I.

That the plaintiff is a railroad corporation organized and existing under the laws of the State of Washington, with power and authority to construct, maintain and operate a line of railroad from Kennewick, Washington, down the north bank of the Columbia River to Vancouver, Washington, and is now engaged in the construction of a railroad between said points, which it proposes to maintain and operate as a common carrier of freight and passengers.

II.

That the defendants Columbia Valley Railroad Company and Wallula Pacific Railroad Company are corporations organized and existing under the laws of the State of Washington.

That plaintiff has acquired as right of way for said railroad a strip of land which is practically continuous between said points above mentioned, and is now in the possession thereof and engaged in the construction of said railroad thereon.

That the plaintiff is the owner and in possession of the following described premises, to wit:

A strip of land one hundred feet in width being fifty feet in width on each side of the center line of plaintiff's railroad as the same is now staked out on the ground and constructed over and across lots one, two, three and four of section thirty-three, and lot two of section thirty-two, township three north, range nine east, Willamette Meridian; lots four and five of section thirty, of township three north, range ten east, Willamette Meridian; lot one of section thirty-three, lots one, two, three and four of section thirty-two, lots, one, two and three section thirty-one, in township three north, range twelve east, Willamette Meridian; lots one, two, and three of section fourteen of township two north, range fourteen east, Willamette meridian; lots four and five of section thirty-one, township three north, range nineteen east,

W. M.; lots one, two, three and four of section twenty-four, township three north, range 20 east, W. M.; lot four of section twelve, township four north, range 23 east, W. M.; lots one, two, three and four of section four, lot one of section six, the south half of the northeast quarter, the north half of the southeast quarter, the southwest quarter of the southeast quarter and the southwest quarter of the southwest quarter of section six, township four north, range twenty-four east, W. M.; the northeast quarter of the northeast quarter, lot one, and the southwest quarter of the northeast quarter of section twenty-eight, township five north, range twenty-five east, W. M.; the south half of the southeast quarter, the southeast quarter of the southwest quarter of section ten, the south half of section eighteen, township five north, range twenty-seven east, W. M.

Also a certain strip of land two hundred feet in width, being one hundred feet in width on each side of the center line of plaintiff's railway as the same is staked out on the ground and constructed over and across lot three of section thirty-two and lot five of section twenty-five, township three north, range nine east, W. M.; lot two of section one, township two north of range twelve east, W. M.; lot four of section thirty-five, township three north, range eleven east,

W. M.; lots one and two of section seven, township two north, range, thirteen east, W. M.; lot one of section six, township two north, range sixteen east, W. M.; lots one and two of section fifteen; lot two of section twenty-two; lots one, two and three and the southeast quarter of the southwest quarter of the sec tion twenty-one; lots one and two of section twenty-eight; lots one, two, three and four section thirteen, township three north, range seventeen east, W. M.; lots one, two, three and four of section eighteen; lots one and two of section seventeen, township three north, range eighteen east, W. M.; lot four of section thirty-two, lots two and three of section thirty-one; lot one of section thirty-four, township three north range nineteen east, W. M.; lots three and five of section thirty, lots one, two and three and the southwest quarter of the southwest quarter of section twenty-two, township three north, range twenty east, W. M.; lots one, two and three of section two, township three north, range twenty-one east, W. M.; lots one, two, three and four of section thirty-two, township four north, range twenty-two east, W. M.; lots one, two, three and four, section thirty-two, township four north, range twenty-two east, W. M.; lots one, two and three of section fourteen, lots one, two and three of section twelve, lots four, five, six and seven of section eighteen township four north range twenty-three east, W. M.; lots one, two, three and four of

section twenty-two, lots three, four and five of section twenty-eight, township five north, range twenty-five east, W. M.; lots one, two, three and four, section ten, township five north, range twenty-nine east, W. M.; lots one and two of section twenty-three; lots one and two of section twenty-four; lots one, two and three of section twenty-six, township six north, range thirty east, W. M.

Also a strip of land one hundred and fifty feet in width, being seventy-five feet in width on each side of the center line of plaintiff's railway as the same is staked out on the ground and constructed across lot one of section twenty-four, township four north, range twenty-two east, W. M.

That all of said premises above described are part of said continuous right of way of said plaintiff between said points above-mentioned, and the same and all thereof are intended for use as part of plaintiff's said right of way in the performance of plaintiff's obligations as a common carrier of freight and passengers in the exercise of the franchise conferred upon the plaintiff by the State of Washington. That part of said premises are situated in the County of Skamania.

That the defendants claim some right, title, estate or interest in said premises, adverse to the title, estate and interest of the plaintiff and said claims of said defendants and each thereof are wrongful and without right.

Whereof, the plaintiff prays the judgment of this Court that it be adjudged to be the owner and entitled to the possession of said premises and all thereof, free from any title, estate, interest or claim of said defendants, or either thereof, and that the claims of the said defendants and each thereof may be adjudged to be wrongful and without right, and for its costs and disbursements herein.

JAMES B. KERR,
GEO. T. REID,
Attorneys for Plaintiff.

Vancouver, Washington.
State of Washington,
County of Clarke,—ss.

James B. Kerr, being first duly sworn, on oath says: That he is an officer, to wit, assistant secretary of the plaintiff above-named, makes this verification as such officer for and in its behalf and is fully authorized so to do; that he has read the foregoing complaint, knows the contents thereof and believes the same to be true.

JAMES B. KERR.

Subscribed and sworn to before me this 10th day of July, 1906.

W. S. LYONS,
Notary Public in and for said County and State,
Residing at Kelso.

State of Oregon,
County of Multnomah,—ss.

I, L. Gerlinger, being first duly sworn, depose and say: I am the president of the complainant corporation, named in the foregoing supplemental bill of complaint. I have heard the same read and know the contents thereof, and I believe the same to be true, and that he makes this affidavit and verification for and behalf of said complainant corporation, being fully and duly authorized so to do.

L. GERLINGER.

Subscribed and sworn to before me this 26th day of July, 1906.

[Seal] R. E. MOODY,
Notary Public for Oregon, Residing at Portland, said State.

Received copy this 28th day of July, 1906.

JAMES B. KERR,
Attorney for Defendant.

[Endorsed]: Supplemental Bill of Complaint. Filed in the U. S. Circuit Court, Western Dist. of Washington Aug. 1, 1906. A. Reeves Ayres, Clerk. By H. M. Walthew, Dep.

In the Circuit Court of the United States for the Western District of Washington, for the ——— Division Thereof.

THE COLUMBIA VALLEY RAILROAD COMPANY (a Corporation),

Compainant,

vs.

THE PORTLAND AND SEATTLE RAILWAY COMPANY (a Corporation),

Defendant.

Motion for Preliminary Injunction.

Comes now the complainant in the above-entitled cause and moves the Court to grant and issue a preliminary injunction against the defendant herein, as prayed for in the supplemental bill of complaint herein; this motion is based upon the supplemental bill of complaint and the affidavit of L. Gerlinger.

W. W. COTTON,
ARTHUR C. SPENCER,
COOVER & STAPLETON,
RALPH E. MOODY,
Solicitors for Complainant,

Service by copy admitted this 28th day of July, 1906.

JAMES B. KERR,
Attorney for Defendant.

[Endorsed]: Motion for Preliminary Injunction. Filed in the U. S. Circuit Court, Western Dist. of Washington, Aug. 1, 1906. A. Reeves Ayres, Clerk. H. M. Walthew, Dep.

In the Circuit Court of the United States for the Western District of Washington, for the ——— Division Thereof.

THE COLUMBIA VALLEY RAILROAD COMPANY (a Corporation),

Complainant,

vs.

THE PORTLAND AND SEATTLE RAILWAY COMPANY (a Corporation),

Defendant.

Affidavit for Preliminary Injunction.

I, L. Gerlinger, being first duly sworn, depose and say, that at the time hereinafter mentioned I was, and ever since have been and now am the duly elected, qualified and acting president of the above-named complainant, The Columbia Valley Railroad Company, and that I make this affidavit upon behalf of the said complainant, in the above-entitled cause, for the purpose of obtaining a restraining order and an injunction in the said cause against the above-named defendant, The Portland and Seattle Railway Company, also a corporation, as prayed for in

the amended bill of complaint and the supplemental bill of complaint of the complainant filed herein; that the said complainant ever since the 16th day of February, 1899, has been, and is now a corporation, duly organized and existing under the laws of the State of Washington for the purpose of building, equipping, operating and acquiring a railroad and telegraph line from Wallula, on the south bank of the Columbia River, in the State of Washington, thence across the Columbia River at a point at or near Wallula, and thence by some eligible route along the north bank of the Columbia River to a point in the State of Washington on the Columbia River at or near the mouth of the said river, and to maintain, operate, lease, contract or acquire the said railroad or telegraph line or lines, to carry freight or passengers thereon and transmit messages thereover, and to receive tolls for the carriage and transmission of the same and to do all things necessary or proper for the accomplishment of the above, as specified in its Articles of Incorporation.

That heretofore, to wit, on the 2d day of February, 1906, complainant filed its original bill herein against the above-named defendant, and that due process by subpoena addressed and directed to the said defendants, requiring the said defendants to appear and answer, was duly and regularly issued and served, and that thereafter the defendant did appear

and plead to complainant's said bill. Thereafter, complainant, by leave of Court first had and obtained, filed its amended bill against the hereinbefore mentioned defendant; and, thereafter, the defendant filed its pleading to the said amended bill, upon which the same is now pending in this court.

II.

That subsequent to the filing of the original and amended bill of complainant in this court, and subsequent to the appearance of the defendant and the filing of the pleadings to the said original and amended bill by the defendant herein, and during the time of the pendency of this cause in this court, to wit, on the 10th day of July, 1906, the said defendant did file in the Superior Court of the State of Washington in and for the County of Skamania, a suit against the complainant herein, and the Wallula Pacific Railroad Company, a corporation, as defendant, which said suit is entitled the Portland and Seattle Railway Company, a Corporation, Plaintiff, versus the Columbia Valley Railroad Company, a Corporation, and the Wallula Pacific Railroad Company, a Corporation, Defendants, a copy of which complaint so filed by the defendants herein against the complainant, and the said Wallula Pacific Railroad Company, as Defendants, is hereto attached, marked Exhibit "A," and made part hereof; that process due and regular was issued and upon the 11th day

of July, 1906, was duly served upon the complainant and the Wallula Pacific Railroad Company, named therein as the defendants, requiring the said defendants therein named to appear within twenty days after the service of the summons, exclusive of the day of service, and to defend the said action in the said Superior Court of the State of Washington, in and for the County of Skamania, and upon failure so to do, judgment would be rendered against said defendants therein named, according to the demands of the complaint, a copy of which was served upon complainant and The Wallula Pacific Railroad Company, as defendants therein.

III.

That the question involved in the said action instituted in the said Superior Court of the State of Washington in and for the County of Skamania, herein before referred to, and the controversy between the parties thereto, and the question presented for adjudication is of the same subject matter involved in the case now pending in this court in this suit, and relates to the same right of way and the same parties, and particularly describes and refers to a portion of the same property, and to allow, or to permit the said action filed by the defendant against the said complainant and the said Wallula Pacific Railroad Company, as defendants, in the

Superior Court of the State of Washington, in and for the County of Skamania, to continue or to further proceed, would affect, impair, or defeat the jurisdiction of this Court in this suit, and would prevent, impair and embarrass the carrying into full force and effect any and all judgments, decrees, rules or orders made by this Court in this proceeding; and the defendant threatens, and will unless restrained by this Court, proceed with the said case herein before referred to, and filed in the Superior Court of the State of Washington, in and for the County of Skamania thus seriously and substantially affecting, impairing, and defeating the jurisdiction of this Court, and defeat the carrying into full force and effect the orders, rules, judgments and decreed made, or to be made by this Court herein.

L. GERLINGER.

Subscribed and sworn to before me this 26 day of July, 1906.

[Seal] R. E. MOODY,

Notary Public for Oregon, Residing at Portland, said State.

In the Superior Court of the State of Washington, for the County of Skamania.

PORTLAND AND SEATTLE RAILWAY COMPANY (a Corporation),

Plaintiff,

vs.

COLUMBIA VALLEY RAILROAD COMPANY (a Corporation), and THE WALLULA PACIFIC RAILROAD COMPANY (a Corporation),

Defendants.

Exhibit "A" to Affidavit for Injunction.

The State of Washington to the said Defendants:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid; and in case of your failure so to do judgment will be rendered against you, according to the demands of the complaint, copy of which is herewith served upon you.

JAMES B. KERR,
GEO. T. REID,
Attorneys for Plaintiff.

P. O. Address, Vancouver, Clarke County, Washington.

In the Superior Court of the State of Washington, for the County of Skamania.

PORTLAND AND SEATTLE RAILWAY COMPANY (a Corporation),

Plaintiff,

vs.

COLUMBIA VALLEY RAILROAD COMPANY (a Corporation), and THE WALLULA PACIFIC RAILROAD COMPANY (a Corporation),

Defendants.

To the Honorable Judge of the Above-named Court:

The above-named plaintiff for its cause of action against the defendants above named shows to the Court as follows:

I.

That the plaintiff is a railroad corporation organized and existing under the laws of the State of Washington, with power and authority to construct, maintain and operate a line of railroad from Kennewick, Washington, down the north bank of the Columbia River to Vancouver, Washington, and is now engaged in the construction of a rairoad between said points, which it proposes to maintain and operate as a common carrier of freight and passengers.

II.

That the defendants Columbia Valley Railroad Company and Wallula Pacific Railroad Company are corporations organized and existing under the laws of the State of Washington.

That plaintiff has acquired as right of way for said railroad a strip of land which is practically continuous between said points above mentioned, and is now in the possession thereof and engaged in the construction of said railroad thereon.

That the plaintiff is the owner and in possession of the following described premises, to wit:

A strip of land one hundred feet in width being fifty feet in width on each side of the center line of plaintiff's railroad as the same is now staked out on the ground and constructed over and across lots one, two, three and four of section thirty-three, and lot two of section thirty-two, township three north, range nine east, Willamette Meridian; lots four and five of section thirty, of township three north, range ten east, Willamette Meridian; lot one of section thirty-three; lots one, two, three and four of section thirty-two; lots one, two and three, section thirty-one, in township three north, range twelve east, Willamette meridian; lots one, two and three of section fourteen of township two north, range fourteen east, Willamette Meridian; lots four and five of section thirty-one, township three north, range nineteen east, W. M.; lots one, two, three and four of sec-

tion twenty-four, township three north, range twenty east, W. M.; lot four of section twelve, township four north, range 23 E., W. M.; lots one, two, three and four of section four, lot one of section six, the south half of the northeast quarter, the north half of the southeast quarter, the southwest quarter of the southeast quarter, and the southwest quarter of the southwest quarter of section six, township four north, range twenty-four east, W. M.; the northeast quarter of the northeast quarter lot one, and the southwest quarter of the northeast quarter of section twenty-eight, township five north, range twenty-five east, W. M.; the south half of the southeast quarter, the southeast quarter of the southwest quarter of section ten, the south half of section eighteen, township five north, range twenty-seven east, W. M.

Also a certain strip of land two hundred feet in width being one hundred feet in width on each side of the center line of plaintiff's railway as the same is staked out on the ground and constructed over and across lot three of section thirty two and lot five of section twenty-five, township three north, range nine east, W. M.; lot two of section one, township two north of range twelve east, W. M.; lot four of section thirty-five, township three north, range eleven east, W. M.; lots one and two of section seven, township two north, range thirteen east, W. M.; lot one of section six, township two north, range sixteen

east, W. M.; lots one and two of section fifteen; lot two of section twenty-two; lots one, two and three and the southeast quarter of the southwest quarter of the section twenty-one; lots one and two of section twenty-eight; lots one, two, three and four, section thirteen, township three north, range seventeen east, W. M.; lots one, two, three and four of section eighteen; lots one and two of section seventeen, township three north, range eighteen east, W. M.; lot four of section thirty-two; lots two and three of section thirty-one; lot one of section thirty-four, township three north, range nineteen east, W. M.; lots three and five of section thirty; lots one, two and three and the southwest quarter of the southwest quarter of section twenty-two, township three north, range twenty east, W. M.; lots one, two and three of section two, township three north, range twenty-one east, W. M.; lots one, two, three and four of section thirty-two, township four north, range twenty-two east, W. M.; lots one, two, three and four, section thirty-two, township four north, range twenty-two east, W. M.; lots one, two and three of section fourteen; lots one, two and three of section twelve; lots four, five, six and seven of section eighteen, township four north, range twenty-three east, W. M.; lots one, two, three and four of section twenty-two; lots three, four and five of section twenty-eight, township five north, range twenty-five east, W. M.; lots one,

two, three and four, section ten, township five north, range twenty-nine east, W. M.; lots one and two of section twenty-three; lots one and two of section twenty-four; lots one, two and three of section twenty-six, township six north, range thirty east, W. M.

Also a strip of land one hundred and fifty feet in width, being seventy-five feet in width on each side of the center line of plaintiff's railway, as the same is staked out on the ground and constructed across lot one of section twenty-four, township four north, range twenty-two east, W. M.

That all of said premises above described are part of said continuous right of way of said plaintiff between said points above mentioned, and the same and all thereof are intended for use as part of plaintiff's said right of way and the performance of plaintiff's obligations as a common carrier of freight and passengers in the exercise of the franchise conferred upon the plaintiff by the State of Washington. That part of said premises are situated in the county of Skamania.

That the defendants claim some right, title, estate or interest in said premises, adverse to the title, estate and interest of the plaintiff and said claims of said defendants and each thereof are wrongful and without right.

Wherefore, the plaintiff prays the judgment of this Court that it be adjudged to be the owner and

entitled to the possession of said premises and all thereof, free from any title, estate, interest or claim of said defendants, or either thereof, and that the claim of the said defendants and each thereof may be adjudged to be wrongful and without right, and for its costs and disbursements herein.

JAMES B. KERR,
GEO. T. REID,
Attorneys for Plaintiff,
Vancouver, Washington.

State of Washington,
County of Clarke,—ss.

James B. Kerr, being first duly sworn, on oath says: That he is an officer, to wit, assistant secretary of the plaintiff above named, makes this verification as such officer for and in its behalf, and is duly authorized so to do; that he has read the foregoing complaint, knows the contents thereof and believes the same to be true.

JAMES B. KERR.

Subscribed and sworn to before me this 10th day of July, 1906.

W. S. LYSONS,
Notary Public in and for said County and State, Residing at Kelso.

(Copy.)

Service by copy admitted this 28 day of July, 1906.

JAMES B. KERR,
Attorney for Defendant.

[Endorsed]: Affidavit for Injunction. Filed in the U. S. Circuit Court, Western Dist. of Washington. Aug. 1, 1906. A. Reeves Ayres, Clerk. H. M. Walthew, Dep.

In the Circuit Court of the United States for the Western District of Washington, for the ——— Division Thereof.

THE COLUMBIA VALLEY RAILROAD COMPANY (a Corporation),

Complainant,

vs.

THE PORTLAND AND SEATTLE RAILROAD COMPANY (a Corporation),

Defendant.

Notice of Motion for Preliminary Injunction, etc.

To the Portland and Seattle Railway Company, the Above-named Defendants:

Please take notice that on the 21st day of August, 1906, at 10 o'clock, A. M., or as soon thereafter as counsel can be heard, the complainant will move for leave to file the supplemental bill of complaint herewith, a copy of which is herewith served upon you as a supplemental bill of complaint in said cause, and will move at the same time for a preliminary injunction as prayed for in the said supplemental bill of complaint herein, and the affidavit of L. Gertlinger,

president of the complainant, a true copy of which affidavit is herewith served upon you.

W. W. COTTON,
ARTHUR C. SPENCER,
COOVERT & STAPLETON,
RALPH E. MOODY,
Solicitors for Complainant.

Service by copy admitted this 28th day of July, 1906.

JAMES B. KERR,
Attorney for Defendant.

[Endorsed]: Notice of Motion for Injunction. Filed in the U. S. Circuit Court, Western Dist. of Washington. Aug. 1, 1906. A. Reeves Ayres, Clerk. H. M. Walthew, Dep.

In Circuit Court of the United States for the Western District of Washington, Western Division.

COLUMBIA VALLEY RAILROAD COMPANY (a Corporation),

Complainant,

vs.

PORTLAND AND SEATTLE RAILWAY COMPANY (a Corporation),

Defendant.

Demurrer to Supplemental Bill of Complaint.

Comes now the defendant above named and demurs to the supplemental bill of complaint of complainant herein, and as grounds of demurrer specifies,

First: That this Court has no jurisdiction of the above-entitled cause.

Second: That said supplemental bill of complaint does not state facts which entitle the complainant to relief.

JAMES B. KERR,
Solicitor for Defendant.

Western District of Washington,
County of King,—ss.

James B. Kerr, being first duly sworn, on oath says: That he an officer, to wit, the assistant secretary of the Portland and Seattle Railway Company, makes this affidavit for and on its behalf; that the above demurrer is not interposed for the purpose of delay.

JAMES B. KERR.

Subscribed and sworn to before me, this 7th day of August, 1906.

A. N. MOORE,
Deputy Clerk, U. S. Circuit Court, Western District of Washington.

I, James B. Kerr, solicitor for defendant above named, hereby certify that the foregoing demurrer is, in my opinion, in point of law well taken.

JAMES B. KERR,
Solicitor for Defendant.

[Endorsed]: Demurrer to Supp. Bill of Complaint. Filed in the U. S. Circuit Court, Western Dist. of Washington, Aug. 7, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

United States Circuit Court, Western District of Washington, Northern Division.

No. 1384.

COLUMBIA VALLEY RAILROAD CO.,
Complainant,

vs.

PORTLAND & SEATTLE RAILWAY CO.,
Defendant.

Memorandum Decision on Application for Injunction, and on Demurrer to Amended Bill of Complaint.

(Filed Sept. 5, 1906.)

This cause has been argued and submitted upon the complainant's application for a preliminary injunction, and upon a demurrer to the amended bill of complaint which alleges as the sole ground of de-

murrer that this Court has not jurisdiction of the subject matter of the suit.

The parties are both corporations of the State of Washington, both proposing to build a railroad on the north side of the Columbia River, and the complainant claims title to a right of way crossing public land of the United States, acquired by compliance with the act of Congress granting to railroads the right of way through public lands, approved March 3, 1875, 18 U. S. Stats. 482, 2 U. S. Compiled Stats. 1901, p. 1568. The fourth section of the act provides that, in case of nonuser for a period of five years the right of way granted shall be forfeited, and the bill shows affirmatively that the complainant has not commenced the construction of its proposed railroad, and that the proceedings by which it claims to have acquired the right of way were completed more than five years before the date of the commencement of this suit. The bill also avers that the defendant has wrongfully entered upon said right of way, and with teams and laborers is actively engaged in constructing the bed for a railroad; that the defendant disputes the complainant's claim of title, and asserts an adverse and superior claim to the same right of way, and by specific averments shows that there is a controversy, the adjudication of which, necessarily, requires an interpretation of the act of Congress above cited, and especially the five year lim-

itation clause, and refers to other United States statutes which may effect the decision of the case.

I am convinced that the amended bill sets forth a controversy involving questions of federal law, and that this Court would have jurisdiction of the case if grounds for equitable relief existed.

Viewed in the light most favorable to complainant, the prayer of the bill is unrighteous, that is to say, it is contrary to natural justice for the complainant to hold all of the right of way two hundred feet wide, which it has not earned, and be permitted to obstruct another railroad company having the ability and will to render the public service which is the consideration for the grant. Manifestly, the purpose of the grant was to facilitate the building of railroads, and the provisions of the third section of the act plainly show a legislative intention to guard against the possibility of the grant being perverted, so as to create a monopoly.

There is a different reason, however, for holding that the suit is not cognizable in a United States Circuit Court, viz.:

a. The suit is in equity.

b. The principles of equity, and sec. 723, U. S. R. S., positively prohibit the maintenance of suits in equity where a plain, adequate and complete remedy may be had at law.

c. The object of the suit is to protect a dry, legal title to real estate by a party out of possession, which title is disputed, and an adverse claim of title is asserted by the defendant in possession, so that the complainant has a plain, adequate and complete remedy at law in the form of an action to recover possession, which is maintainable at law, and the recognized appropriate form of proceeding to obtain an adjudication of a controversy with respect to the legal title to real estate.

The complainant is not in court asking protection in the actual prosecution of the building of a railroad upon a right of way of which it has taken actual possession. On the contrary, it appears affirmatively by the complainant's pleadings that construction has not been commenced, and that the defendant is in possession of the right of way. These facts differentiate the case from Alling vs. Railway Company, 99 U. S. 463.

Only a dry, legal title is claimed, and that title is disputed by the defendant, it claiming the same property by a title adverse to the complainant, and there is another suit pending, brought by defendant, to secure an adjudication of the adverse claims of the respective parties, and it is not pretended that irremediable mischief, going to the destruction of the substance of the estate, is being done. Hence, there is no ground for an injunction, which is the

principal relief prayed for. Erhardt vs. Boaro, 113 U. S. 537.

The defendant being in possession, if the complainant has the legal title, as it claims, an action of ejectment, in which the parties would have a right to a trial, is the proper form of procedure, and affords an adequate and complete remedy.

Whitehead vs. Shattuck, 138 U. S. 146;
M. K. & T. Ry. Co. vs. Roberts, 152 U. S. 114;
New Mexico vs. U. S. Trust Co., 172 U. S. 171.

I can conceive of a case in which an injunction might be properly issued to restrain a competitor from vexatiously interfering in proceedings to acquire a right of way for a projected railroad, and I concede that controversies involving only equitable or inchoate rights of rival companies, with respect to right of way franchises, may be cognizable in equity. An instance which I have in mind is the case of Sioux City & D. M. Ry. Co. vs. Chicago M. & St. P. Ry. Co., 27 Fed. Rep. 770. In the statement of that case Judge Shiras said:

"There is but one controversy in the cause, and that is, which company has the prior, and therefore better, right to the occupancy of the premises in dispute, for the purposes of constructing and operating its line of railway?"

And I agree fully with that part of the opinion of the learned judge, in which he said:

"It is certainly equitable that a company, which in good faith surveys and locates a line of railroad, and pays the expense thereof, should have a prior claim for the right of way for at least a reasonable length of time. The company does not perfect its right to the use of the land, as against the owner thereof, until it has paid the damages, but, as against a railroad company, it may have a prior right and better equity."

When only equitable rights constitute the subject of a lawsuit, the parties have recourse only to a court of equity, and courts of equity are established for the express purpose of adjudicating such rights. The case last cited has a resemblance to the case at bar, in this, that the matter in dispute was the right of way for a projected line of railway, but the two cases are in contrast, because in this case the complainant has invoked the jurisdiction of a court of equity, as I have before stated, to protect a dry, legal title to real estate, when it was unnecessary to appeal to a court of equity, there being no obstacle in the way of obtaining adequate relief, and substantially the same relief, by an action in a court of law. In deciding the question submitted, the Court cannot assume that there are equitable rights to be adjusted, but is bound in rendering a decision to treat the averments of the bill of complaint, with respect to the complainant's title and the defendant's possession, as true.

The amended bill suggests that it is necessary to sue in equity to avoid a multiplicity of suits, but the facts pleaded do not support that conclusion. The agents and servants of the defendant engaged in constructing its railroad would not be necessary parties to an action at law to recover possession, by reason of privity, a judgment against the defendant would be as conclusive upon them as a decree in this case in which they are not parties. 2 Ballinger's Code, section 5518. All of the right of way situated within this judicial district is a unit, and there need be but one action to secure a complete adjudication of the whole controversy between the parties to this case. If detached sections of the right of way should be deemed subjects of separate causes of action, cognizable in different counties, still only one action would be necessary, because the Code of Civil Procedure of this state provides that an action may be prosecuted in the county in which the subject, or some part thereof, is situated, and that several distinct causes of action may be joined in one complaint. 2 Ballinger's Code, sections 4852-4942; Stevens vs. Ferry, 48 Fed. Rep. 7.

The complainant's application for an injunction is denied; and the demurrer to the amended bill of complaint is sustained.

C. H. HANFORD,

Judge.

[Endorsed]: Mem. Decn. On Application for Injunction, and on Demurrer to Amended Bill. Filed in the U. S. Circuit Court, Western Dist. of Washington. Sept. 5, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

THE COLUMBIA VALLEY RAILROAD CO.,
Complainant,

vs.

THE PORTLAND AND SEATTLE RAILROAD COMPANY,
Defendant.

Order Extending Time to Serve and File Amended Complaint.

On application of the complainant, The Columbia Valley Railroad Co., by its attorney, W. W. Cotton, it is considered ordered and adjudged that the said complainant, The Columbia Valley Railroad Company, have ten days time from and after this date within which to serve and file an amended complaint in the above-entitled cause.

Dated September 8th, 1906.

C. H. HANFORD,
Judge.

[Endorsed]: Order Granting Leave to File and Amended Bill of Complaint. Filed in the U. S. Circuit Court, Western Dist. of Washington, Sept. 8, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

In the Circuit Court of the United States for the Western District of Washington.

IN EQUITY.

COLUMBIA VALLEY RAILROAD COMPANY (a Corporation),

Complainant,

vs.

THE PORTLAND AND SEATTLE RAILWAY COMPANY (a Corporation),

Defendant.

Second Amended Bill of Complaint.

To the Honorable, the Judges of the Circuit Court of the United States for the Western District of Washington:

The Columbia Valley Railroad Company, a railroad corporation duly organized and existing under and by virtue of the laws of the State of Washington and having their principal office and place of business in that State, by leave of Court first had and obtained, brings this their second amended bill of complaint against the Portland and Seattle Railway

Company, a railroad corporation, duly organized and existing under and by virtue of the laws of the State of Washington, and having their principal office and place of business in said State, and thereupon your orator complains and says:

I.

That your orator, The Columbia Valley Railroad Company now is and ever since the 16th day of February, 1899, has been a corporation, duly organized and existing under and by virtue of the laws of the State of Washington, for the purpose of building, equipping, operating and acquiring a railroad and telegraph line from Wallula, on the south bank of the Columbia River in the State of Washington; thence across the Columbia River at a point at or near Wallula, and thence by some eligible route along the north bank of the Columbia River to a point in the State of Washington, on the Columbia River, at or near the mouth of the said river, and to maintain, operate, lease, contract or acquire the said railroad or telegraph line or lines, to carry freight or passengers thereon, and to transmit messages thereover and to receive tolls for the carriage and transmission of the said, and to do all things necessary or proper for the accomplishment of the objects as specified in its Articles of Incorporation.

II.

And your orator further shows that the defendant,

The Portland and Seattle Railway Company, is a corporation, organized under and by virtue of the laws of the State of Washington, for the purpose of constructing and operating a railroad.

III.

And your orator further shows that your orator claims the right of way hereinafter described over the public lands of the United States hereinafter described under and by virtue of the provisions of the act of Congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States." That the said act of Congress, among other things, provides that the right of way through the public lands of the United States is thereby granted to any railroad company duly organized under the laws of any State or territory except the District of Columbia, or by the Congress of the United States which shall have filed with Secretary of the Interior a copy of its Articles of Incorporation and due proofs of its organization under the same to the extent of 100 feet on each side of the central line of the said road; also the right to take, from the public lands adjacent to the line of the said road, material, earth, stone and timber necessary for the construction of the said railroad, also ground adjacent to such right of way for station buildings, depots, machine-shops, side-tracks, turnouts and water stations not to exceed in

amount twenty acres for each station, to the extent of one station for each ten miles of its road.

The said act of Congress further provides that any railroad company desiring to secure the benefits of the said act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed land, within twelve months after the survey thereof by the United States, file with the Register of the land office for the District where said land is located a profile map of its road, and upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office, and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way; provided, that if any sections of such road shall not be completed within five years after the location of such section, the rights granted by such act shall be forfeited as to any such uncompleted section of said road.

It is further provided in said act of Congress that the act shall not apply to any lands within the limits of any military park, or Indian Reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty stipulation, or by act of Congress heretofore passed.

That at all the times hereinafter mentioned the said act of Congress was and is in full force and

effect and unrepealed, and reference is hereby made to the said act of Congress at 18b Statute, page 482.

IV.

And your orator further shows that in order to carry out the provisions of the said act of Congress, the Honorable Secretary of the Interior, from time to time made regulations concerning the procedure to be followed by any railroad company in obtaining a right of way as provided in said act over the public lands of the United States, and on the 4th day of November, 1899, and by a circular of August 7th, 1899, adopted and promulgated such regulations, which were to be followed thereafter, and which provided among other things that any railroad desiring to obtain the benefits of the said act should file through the office of the Commissioner of the General Land Office, or the Register of the land district in which the principal terminus of the road is to be located to be forwarded to the Secretary of the Interior.

First: A copy of its Articles of Incorporation duly certified to by the proper officer of the company under its corporate seal or by the Secretary of the State or territory where organized.

Second: A copy of the State and territorial laws under which the company was organized, with the certificate of the Governor or Secretary of the State or territory that the same is the existing law.

Third: When the said law directs that the Articles of Association or other papers connected with the organization be filed with any State or territorial officer, the certificate of such officer that the same have been filed according to law with the date of the filing thereof.

The fourth rule relates to the acts of a company operating in another State or territory than that in which it is incorporated, and is not deemed pertinent to this suit.

Fifth: The official statement under the seal of the proper officer that the organization has been completed; that the company is fully authorized to proceed with the construction of the road according to the existing law of the State or territory in which it is incorporated.

Sixth: An affidavit by the president under the seal of the company, showing the names and designations of its officers at the date of the filing of the proof.

Seventh: If certified copies of the existing laws regarding such corporations, and of new laws as passed from time to time be forwarded to the office of the Secretary of the Interior, by the Governor or Secretary of any State or Territory, a company organized in such State or Territory may file, in lieu of the requirements of the second subdivision of this paragraph, a certificate of the Governor or Secretary

of the State or Territory that no change has been made since a given date, not later than that of the laws last forwarded.

It is further provided in the said regulations that if the lands which the said railroad is to traverse are located in more than one district, duplicate maps and field-notes need be filed in but one district, and single sets in the other.

It is further provided in said regulations that the said maps must be drawn on tracing linen in duplicate and must be strictly conformable to the field-notes of the survey of the line of route or of the station grounds, and that the field-notes of the survey shall be written along the line on the map, or if the map would thereby be too much crowded to be easily read, then duplicate field-notes shall be filed separate from the map, in such form that they may be folded for filing, and that a sufficient number of stations shall be shown on the map to make it convenient to follow the field-notes, and that the map shall show the lines of reference of initial and terminal points, with their courses and distances, and that public surveys represented on the map should have their entire boundaries drawn, and on all lands affected by the right of way. The smallest legal subdivision (40-acre tracts and lots) must be shown, and that the terminal of the line of road should be fixed by reference by course and distance to the near-

est existing corner of the public survey, and that the map, field-notes, engineer's affidavit and president's certificate, as provided in said regulations shall each show these connections, and that the company must certify that the road is to be operated as a common carrier of passengers and freight.

And that when the line of survey crosses a township or section line of the public survey, the distance to the nearest existing corner shall be ascertained and noted, which the map and field-notes shall show at the points of intersection.

It is further provided that the engineer's affidavit and president's certificate required as aforesaid must be written on the map, and must both designate by termini and length in miles and decimals the line and route for which right of way application is made.

That appropriate forms are provided by the said regulations, to be followed. Reference is hereby made to the said regulations.

V.

And your orator further shows, that in pursuance of the said objects of its incorporation and for the purpose of obtaining a right of way over the public lands of the United States wherever its said railroad shall traverse the same, and in accordance with the terms of the said Act of Congress, and the said regulations adopted in pursuance thereof, your ora-

tor on the 7th day of April, 1899, duly filed with the Honorable Secretary of the Interior at Washington, in the District of Columbia, a copy of its Articles of Incorporation, and due proofs of its organization under the same, duly certified to by the president of your orator, under its corporate seal, together with a duly certified copy of the laws of the State of Washington, under which your orator was organized as a corporation in all respects as required by the said law and the said regulations, and the proper certificates of the officers in the said State of Washington as required by the said regulations, that the said articles had been filed with the said officer according to law, with the date of filing thereof, and that the organization of your orator as a corporation had been completed, and that your orator was fully authorized to proceed with the construction of its said road according to the existing laws of the said State, and the affidavit by the said L. Gerlinger, who was then and there the president of the said corporation, showing the names and designations of its officers at the date of filing the said proofs, and in all respects conforming to the requirements of the said act of Congress and of the said regulation.

VI.

And your orator further shows, that thereupon and by virtue of the said act of Congress and of the said regulations, and of the compliance therewith by

your orator as aforesaid, your orator, The Columbia Valley Railroad Company, on the 27th day of December, 1899, became entitled to acquire a right of way over, through and across the public lands of the United States designated in said act along its said route or railroad, to consist of a strip of land to the extent of 100 feet in width on each side of the central line of its said railroad, through all public lands along said route as granted by said Act of Congress, and to survey, locate, construct, operate and maintain its said railway across said lands over said right of way as aforesaid, and particularly through and over the public lands hereinafter more particularly described, lying along the route of the said railroad.

VII.

And your orator further shows, that for the purpose of fixing, designating and locating its said right of way granted as aforesaid, your orator caused the central line of its said railroad to be definitely surveyed and located on the ground beginning at a point at Station 4438-38 which is a point in the State of Washington, County of Yakima, directly opposite Wallula in the northwest quarter of section 21, township 7, north of range 31 east, W. M., and is south 72 degrees 27 minutes west 5320 feet from the corner to sections 15, 16, 21 and 22 in the township and range aforesaid, and thence to station 3379-93, which is a point south 23 degrees, 35 minutes west 2880 feet

from the northeast corner of section 1, township 5 north of range 28 east, W. M., a length of twenty miles, and continuing, beginning at Station 3379-93, which is a point south 23 degrees 35 minutes west 2880 feet from the northeast corner of section 1, township 5 north of range 28 east, W. M., thence to Station 2522-98, which is a point south 16 degrees 10 minutes west 1955 feet from the quarter section corner to sections 13 and 14, township 5 north of range 25 east, W. M., a length of twenty miles.

That your orator began the survey and location on the ground of the said route of its railroad as aforesaid on the 22d day of April, 1899, and finished the survey and location of the first twenty miles thereof as aforesaid on the 6th day of May, 1899, and began the survey and location of the second twenty miles as aforesaid on the 6th day of May, 1899, and finished the same on the 15th day of May, 1899, and began the survey of the third section of the twenty miles on the 15th day of May, 1899, and finished the same on the 24th day of May, 1899, and began the survey of the fourth section of twenty miles thereof on the 24th day of May, 1899, and finished the same on the 6th day of June, 1899, and began the survey of the fifth section of twenty miles thereof on the 6th day of June, 1899, and finished the same on the 18th day of June, 1899, and began the survey of the sixth section of twenty miles thereof on the 18th day of June,

1899, and began the survey of the seventh section of twenty miles thereof on the 20th day of April, 1899, and finished the same on the 29th day of June, 1899, and began the survey of the eighth section on April 20th, 1899, and finished the same on June 27th, 1899.

That the said central line of the route of the said railroad as so surveyed was at the time of making such surveys marked upon the ground by stakes such as are usually employed by surveyors of railroad lines, driven in the ground at the end of each 100 feet of the said line commencing at the said beginning point described as aforesaid and extending thence along said surveyed route to the ending point of the first twenty miles, and from thence along said surveyed route to the end of the said seventh section thereof as aforesaid. Each of the said stakes represented a station of 100 feet, and each of the said stakes was marked and numbered in the manner usual with surveyors of railroad lines, and the said central line of the route of the said railroad as so surveyed and marked upon the ground in the usual and customary way of surveyors, surveying and locating the line of route of railroads, and the same at all times was then and has since been readily to be observed and traced upon the ground.

VIII.

And your orator further shows that immediately after each of the said sections of twenty miles of the

survey were made as aforesaid, your orator caused correct maps or profiles thereof respectively to be made, and thereupon, J. W. Coovert, who was then and there duly authorized and appointed chief engineer of your orator, duly made his affidavit, which was then and there duly sworn and subscribed to before a notary public authorized to administer said oath, and which affidavit was written upon each of the said maps or profiles, and each of which affidavits designated by termini and length in miles and decimals, the line of railway described and surveyed as aforesaid, and appearing upon the said map was made by him as chief engineer of your orator, herein, and under its authority, and gave the date of the beginning and of the completion of the said survey of the section of twenty miles shown by the said map, and that the survey of the said line was accurately represented on each of the said maps and by the field-notes accompanying each of them, and the said affidavit which was written upon the map showing the eighth section of twenty miles of the said railroad described the beginning point of the said section as follows:

Beginning at Station 931-47, which is a point 1226 feet south and 1955 feet west from the quarter section corner to sections 34 and 35, township 3 north of range 11, east, W. M., to station 1987-38, which is a point 912 feet east and 1086 feet south of the quarter

section to sections 27 and 28, township 3 north of range 8 east, W. M., a length of twenty miles, and that the said survey was commenced on the 20th day of April, 1899, and ended on the 27th day of June, 1899, and that the survey of the said line is accurately represented on the said map and by the accompanying field-notes thereto.

That L. Gerlinger, who was then the president of your orator, duly made a certificate for each of the aforesaid maps, wherein he certified that he was the president of your orator; that the said J. W. Coovert, who subscribed the affidavit accompanying each of the said maps, was the chief engineer of your orator; that the survey of the said rairoad as accurately represented on each of the said maps and by the field-notes thereof, was made under the authority of your orator; that your orator was duly authorized by its articles of incorporation to construct the said railroad upon the location shown upon the said maps; that the survey as represented on each of the said maps and field-notes thereof was adopted by resolution of its Board of Directors on a certain day in said certificate stated, as the definite location of the said railroad, and which survey as to each map described the beginning and terminal points shown; and that each of the said maps had been prepared to be filed in order to obtain the benefits of the act of Congress approved March 3, 1875, entitled "An act

granting to the railroads the right of way through the public lands of the United States," and each of which said certificates further certify that the said railroad was to be operated as a common carrier of passengers, and each of which certificates was officially duly signed by said L. Gerlinger, as president of your orator, and attested by George W. Stapleton, who was then and there the duly appointed and acting Secretary of your orator, and which certificates respectively, were written upon each of the said maps respectively, and the said certificates written upon the eighth section thereof as aforesaid designated the 27th day of December, 1899, as the date when the said survey was adopted by the said Board of Directors as aforesaid.

That the said maps as aforesaid were made in all respects conformably to the regulations of the Secretary of the Interior hereinbefore described and referred to, and conformably to the field-notes of the survey of the line of the said route for the whole distance of the said 160 miles.

That the said J. W. Coovert, as chief engineer, in making the said surveys, made accurate field-notes thereof so complete that the said line may be retraced from them on the ground to conform to the said regulations in every respect.

That the said maps and field-notes were each duly filed with the Board of Trustees of your orator and

duly approved by the said Board of Trustees, and the said line of the said railroad as so designated and surveyed was duly adopted as the located line of your orator for the purpose among other things of obtaining the benefits of the said act of Congress of March 3, 1875, hereinbefore mentioned, and the maps and field-notes of the eighth section thereof were approved and the line thereof located by the said Board of Trustees on the 27th day of December, 1899.

IX.

And your orator further shows, that thereafter the maps of the first, second, third and fourth sections thereof were duly filed in the land office of the Walla Walla land district, Washington, on the 21st day of March, 1900, and the maps and field-notes of the fifth, sixth and seventh sections thereof were duly filed in the land office of the Vancouver Land District, at Vancouver, Washington, on the 19th day of October, 1900, and the maps and the profiles of the eighth section thereof were duly filed in the land office of the Vancouver land district at Vancouver, Washington, on the 29th day of December, 1900, the said Walla Walla land district at Walla Walla, Washington, being the land district in which the land traversed by the line described in the maps so filed at Vancouver was situated. And each of said maps were duly filed of record by the Register of the said

land office respectively, as required by the said act of Congress and the regulations thereunder, and have ever since remained and are now of record in said land office.

That duplicates of each of the said maps were respectively transmitted to the Honorable Secretary of the Interior, immediately after the same were approved by the Board of Trustees as aforesaid, and the said Honorable Secretary received and filed the same as required by the said act of Congress and the regulations of the said department described as aforesaid, and as to the said eighth section of the said land as aforesaid, the map thereof was duly approved by the said Honorable Secretary of the Interior at Washington, D. C., on the 29th day of September, 1900.

X.

And your orator further shows, that the said right of way (being 100 feet on each side of the central line thereof) and said line of railway as so surveyed and located and so designated upon the said maps as aforesaid traverse, SE. 1/4 of the SW. 1/4 in section 21, township 3 north, range 10 east of the Willamette Meridian, lots 1, 3, and 4, in section 29, township 3 north of range 10, east of the Willamette Meridian, lots 4 and 5, section 30, township 3 north of range 10 east of the Willamette Meridian, lots 3, 4 and 5, section 25, township 3 north of range 9 east

of the Willamette Meridian, lot 1, section 35, township 3 north of range 9 east of the Willamette Meridian, lots 1 and 2, section 34, township 3 north of range 9 east of the Willamette Meridian, lots 1, 2, 3, and 4, section 33, township 3 north of range 9 east of the Willamette Meridian, lots 2, 3 and 4, section 32, township 3 north of range 9 east of the Willamette Meridian, and lots 3 and 4, section 35, township 3 north of range 8 east of the Willamette Meridian.

That at the time of the organization of your orator the making and filing of its Articles of Incorporation under the laws of the State of Washington, and at the date of the filing of the copy of its Articles of Incorporation, and the proofs of its organization under the same, with the Secretary of the Interior, and at the time of making the said surveys, maps and field-notes, and at the time of approving the said maps and adopting the said line of railway as aforesaid by the Board of Directors of your orator, as aforesaid, all of the above described land and each and every subdivision thereof were public lands of the United States, and were not then or there within the limits of any military, park, or Indian Reservation and were not specially reserved from sale, and were and are subject to the grant made in the said act of Congress on March 3, 1875, hereinbefore referred to.

XI.

And your orator further shows, that by reason of the premises your orator, prior to the 27th day of December, 1899, became and ever since has been and now is the owner of the right of way through all the public lands above described and traversed by the said railway to the extent of 100 feet on each side of the central line of its said railroad as the same was so surveyed, located and adopted from the said point opposite Wallula to the said point described as the end of the survey of the said one hundred and sixty miles thereof.

XII.

And your orator further shows that all the said steps taken as aforesaid by your orator were taken in good faith for the purpose of constructing a railroad along the route described in its Articles of Incorporation, and your orator at all times since its incorporation has been and now is actively engaged in prosecuting the said enterprise, and desires and intends to construct with reasonable dispatch, and operate a railroad over said line described in its articles of incorporation, from a point opposite Wallula to a point near the mouth of the Columbia River for the carriage of freight and passengers in accordance with its article of incorporation, and is in all respects conforming to and intends to conform to the provisions of the said Act of Congress hereinbefore

referred to, and the regulations of the said Secretary of the Interior relative to survey, location and construction of its said railroad.

XIII.

And your orator further shows that it was at the time of the institution of this suit and it is now in the actual possession of its right of way over the said public land hereinbefore described, as it traverses lot 1, section 35, lots 1 and 2, section 33, and lots 2 and 3, in section 32, all in township 3, north of range 9, east of the Willamette Meridian, and lot 4, section 35, township 3, north of range 8, east of the Willamette Meridian, and is now and has been, for some time prior hereto, actually and actively engaged in the building and construction of a grade for its railroad therefor and thereon, and is now expending and has heretofore expended large sums of money in and for said construction, and has completed the grade upon some portion thereof.

XIV.

And your orator further shows that about the 29th day of December, 1905, the defendant, the Portland and Seattle Railway Company, through its officers, agents, servants and employees, wrongfully and without authority of law, or the consent of your orator entered upon a part of the right of way hereinbefore described, which lays upon the public lands

of the United States hereinbefore described, and particularly upon the following described parts thereof: SE. ¼ of the SW. ¼ in section 21, township 3 north of range 10 east of the Willamette Meridian, lots 1, 3 and 4, section 29, township 3 north of range 10 east of the Willamette Meridian, lots 4 and 5, section 30, township 3 north of range 10 east of the Willamette Meridian, lots 3, 4 and 5, section 25, township 3 north of range 9, east of the Willamette Meridian, lots 1 and 2, section 34, township 3 north of range 9 east of the Willamette Meridian, lots 2, 3 and 4, section 33, township 3 north of range 9 east of the Willamette Meridian, lot 4, section 32, township 3 north of range 9 east of the Willamette Meridian, and lot 3, section 35, township 3 north of range 8 east of the Willamette Meridian.

That at the time the defendant so entered upon said premises your orator's maps of location had been filed with the Honorable Secretary of the Interior, and by such officer approved, which fact defendant, before entering said premises, well knew, and the location of your orator's said railroad was plainly and distinctly marked upon the ground, as hereinbefore more fully shown, and of which fact the defendant had actual knowledge. Notwithstanding said well-known premises, defendant wrongfully and unlawfully, and without right or authority, made an attempted location of and for its railroad upon your

orator's said right of way. Defendant's said attempted location was not only made upon that portion of your orator's right of way which traverses the land in this paragraph described, but upon all of your orator's right of way that traverses any of the land mentioned or described in this bill. And though the defendant could have so located its line as not to have materially affected, or in any manner interfered with, or injured or destroyed, your orator's right of way, the defendant, by deliberate act, design, and intent so located its line that the same would not only conflict with your orator's location, but would prevent the use of the said right of way so acquired as aforesaid by your orator, by making it physically and financially impossible to construct a railroad upon your orator's fixed and located line.

That the defendant made its location so that when a railroad was constructed on such attempted location no other railroad could be located, constructed and operated in Skamania County, Washington, on the north bank of the Columbia River, except at a cost which would be prohibitory.

That the line of your said orator is so located as permits the location and construction of another line of railroad on the north bank of the Columbia River, but the construction of a railroad on the defendant's attempted location will prevent the building of any

other railroad on the said bank of the Columbia River.

That upon that portion of your orator's right of way which passes over and through the land described in this paragraph, the defendant is now wrongfully and without authority constructing a railroad grade on defendant's said attempted location, and has sent and placed thereon its men, teams and apparatus, and is engaged in excavating the ground thereon, and making fills, cuts and embankments, with intent to construct and operate a line of railway over said defendant's location, and defendant intends and declares that it will continue the said work of constructing its said railway on said defendant's attempted location over and upon said right of way of your orator, from its beginning point to its ending point, as hereinbefore described, over and across the public lands aforesaid, and has wrongfully and without authority entered upon the lands described in this paragraph, for the purpose of building, constructing and operating its said railroad, and threatens and intends, and will, unless restrained by your Honors, enter upon the right of way of your orator through your orator's entire line, for the purpose of constructing and operating a railway upon said defendant's attempted location, and for the further purpose of preventing your orator from con-

structing and operating a railway upon your orator's located line.

That the curves in defendant's grade differ from the curves shown by your orator's located line, and the height of said grade differs from the height of your orator's grade, as shown by the profiles filed with the Secretary of the Interior, and if the defendant be allowed to complete its grade, such grade will greatly add to the expense of constructing a grade on the location of your orator, and in some places will prevent such construction, except at such expense as would be absolutely prohibitory.

That in constructing said grade the defendant is borrowing large quantities of material from your orator's said right of way, and is using, and threatening to use, said material in the construction of the grade of the defendant, and such action on the part of the defendant will greatly and materially add to the expense of constructing a grade in many places on the location of your orator, and at other places will cause expense so great as to make the construction of a grade prohibitory.

That the work which the defendant has already done will increase the expense of constructing a railroad on your orator's location to amount far in excess of two thousand dollars.

XV.

And your orator further shows that the defendant

unlawfully and without authority intends and threatens, and will, unless restrained by your Honors, attempt to, and enter in and upon that portion of the land upon which is your orator's right of way, described in paragraph XIII of this bill, which is now in possession of your orator, and upon which your orator is now engaged in constructing its grade for its railroad, and that the defendant will and intends to enter upon the said land unless restrained by your Honors, and destroy and injure your orator's said grade located thereon, and prevent your orator from further building and constructing its grade thereon, to your orator's irreparable injury and damage.

XVI.

And your orator further shows that the defendant disputes the right and title of your orator to the right of way hereinbefore described over the public lands hereinbefore described, upon the ground that more than five years have elapsed since the location of the said eighth section of twenty miles of your orator's said road as aforesaid, and that the said eighth section of said railroad has not been completed within five years from the said location, and claims and pretends that under and by virtue of the provisions of the said act of March 3, 1875, the right and title of your orator to the right of way over the said public lands hereinbefore described were and

are forfeited as to the said section of said road, and claims the said alleged forfeiture under and by virtue of the provisions of section 4 of the said act of March 3, 1875, which is to the effect that if any section of the said road shall be completed within five years after the location of the said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road; and the defendant pretends and claims that by virtue of the said provision, the failure of your orator to complete the said section within the said five years of itself and without any judicial proceeding or Congressional action works such forfeiture.

XVII.

And your orator further shows that the defendant further pretends and claims the right to go upon your orator's said right of way and to build its said road thereon by virtue of various act of Congress.

It claims a right paramount to your orator's right to enter upon and construct its road over lot 5 of section 25, lot 1 of section 35, and lot 3 of section 32, in township 3 N., R. 9 east of the Willamette Meridian, and lot 4 in section 35, township 3 N., R. 8 east of the Willamette Meridian, under and by virtue of the act of Congress of date July 1, 1898, which act, among other things, in substance and effect granted to the Northern Pacific Railroad Company, or its lawful successors, the right upon the relinquishment

of other lands within the grant of the said Northern Pacific Railroad Company, to select in lieu of the land relinquished an equal quantity of certain public lands, surveyed or unsurveyed, not mineral or reserve, and not valuable for stone, iron or coal, and free from valid adverse claim, and not occupied by settlers at the time of such location, situated in any State or Territory into which the said railroad grant extended; and among other things the said grant provides, in section 1 thereof, "that the Secretary of the Interior shall from time to time ascertain, and as soon as conveniently may be done cause to be prepared and delivered to the said railroad or its successors in interest a list or lists of the several tracts which had been purchased or settled upon or occupied, and which were claimed by purchasers or occupants.

And the defendant pretends and claims that the said Secretary of the Interior, in pursuance of the said act, made a list, which is number 181, and which was filed September 5, 1905, and which included the land hereinbefore last described, and under and in pursuance of the said act of Congress July 1, 1898, the said Northern Pacific Railroad Company, which the defendant claims was the lawful successor of the Northern Pacific Railroad Company, became and was entitled to own and possess the said land, and the defendant claims that the said Northern Pacific

Railroad Company has conveyed to the defendant its said rights in the premises, and that its said right to enter upon the said land and construct its line is paramount and superior to your orator's said right of way.

The defendant claims the right to go upon and occupy lot 1 of section 29, township 3 north of range 10 east of the Willamette Meridian, under and by virtue of an act of Congress of June 3, 1878, commonly called the timber and stone act, and pretends and claims that one, Heinrich Kapp, by compliance with the terms of the said act, became the owner of the said land long subsequent to the time of the location of your orator's line as aforesaid, and that the said Heinrich Kapp, by some contract or agreement, has granted to the defendant the right to go upon the said land and do the acts of which your orator complains as aforesaid. And the defendant claims the right to go upon lots 4 and 5 of section 30 of the said township and range under and by virtue of the homestead laws of Congress, and claims that the said Heinrich Kapp filed a homestead thereon on the 28th day of December, 1903, and has since deeded to the defendant the said lots.

XVIII.

Your orator further shows that the defendants claim the right to go upon lots 1 and 2 of section 34, township 3 N., R. 9 east of the Willamette Meridian,

and construct its line of railway as aforesaid by virtue of the homestead laws of Congress, and claim and pretend that at the time of the location of your orator's line as aforesaid, one, Samuel Martin, claimed a homestead on said lots, but said homestead was canceled March 23, 1901, and that defendant claims that under the said acts of Congress your orator has no right of way on the said lots in said section 34.

The defendant pretends and claims the right to enter upon and hold lots 1, 2, 3 and 4 in section 33, township 3 north, range 9 east of the Willamette Meridian, under an act of Congress called the homestead act, and that Paul Paulson filed a homestead on the said lots on August 11th, 1905, and has contracted with the defendant to give it the right of way occupied by your orator's right of way over the said lots.

The defendants claim the right to go upon lot 2 of section 32, township 3 N., R. 9 east of the Willamette Meridian, under the said timber and stone act hereinbefore referred to, of June 3, 1878, and claims that A. Fleischner made an application under said act for said land, dated April 22, 1903, and became entitled to the possession of the said land, and has contracted with the defendants for its pretended right of way as aforesaid.

And the defendant claims the right to go upon lot 4, section 32, township 3 north, of range 9 east, W. M., under the homestead act of Congress, and claims that Paul Paulson, under the terms of the said act, became and was entitled to the said lot 4 as a homestead, on the 11th day of August, 1905, and has conveyed to the defendant the right to go upon your orator's right of way as aforesaid.

The defendant claims the right to enter upon your orator's right of way in lots 3 and 4 of section 35, township 3 north of range 8 east, of the Willamette Meridian, under and by virtue of the homestead act of Congress, and pretends and claims that Thomas Menice had a homestead at the time of your orator's location of its said right of way, which subsequently relinquished by him, and that by virtue of said act that your orators have no right of way over the said lots.

That the defendant makes no pretense or claim controverting your orator's right and title to its said right of way, or maintaining its own right and title to the said right of way, or to justify the said acts of trespass and threatened trespass, except rights that arise under the said several acts of Congress, and that in determining the respective rights of your orator and the defendant in and to the said land and their priorities, it will be necessary for this Court to consider, construe and apply the said acts of Con-

gress, and the said act of Congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States."

That the defendant pretends to own and claims the right to occupy your orator's said right of way for the construction of the defendant's road, and by its agents, servants, and employees, contractors and subcontractors is continually trespassing and threatening to trespass upon the said right of way as aforesaid.

That unless the defendant shall be restrained and enjoined from continuing its said trespasses and threatened trespass aforesaid, your orator will be required to bring multiplicity of suits against the defendant and against its several employees, servants and agents to prevent the said injury and the said wrongful acts, and that your orator's injury cannot be compensated in damages.

XIX.

And your orator further shows that the value of the said right of way over the lands described in paragraph X in this bill exceeds the sum of two thousand dollars (2,000), and that the value of the right of way over the lands described in paragraph XIII of this bill exceed the sum of two thousand dollars ($2,000), and that the value of the said right of way over lands described in paragraph XIV of

this bill exceed the sum of two thousand dollars ($2,000), and that the amount in dispute herein exceeds the sum of two thousand dollars ($2,000), exclusive of interest and costs.

And your orator further shows that your orator has no plain, speedy or adequate remedy at law.

XX.

To the end that your orator may obtain the relief to which it is justly entitled in the premises, it now prays the Court to grant it due process by subpoena directed to the said Portland and Seattle Railway Company, defendant hereinbefore named, requiring it to appear herein and answer, but not under oath, the same being expressly waived, the several allegations in this, your orator's second amended bill contained, and that the said defendant, The Portland and Seattle Railway Company, and its servants, agents and employees and all other under or by its direction be enjoined and restrained from entering upon any of the said lands described in this amended bill in paragraph X, XIII, and XIV, within your orator's said right of way and from constructing any part of its railway thereon, and from making any excavations or doing any of the things aforesaid which obstruct, retard or prevent your orator from using its said right of way or from constructing and operating its said line of railway as described in this bill, and that pending this suit a preliminary injunc-

tion shall be granted against the defendant, The Portland and Seattle Railway Company, enjoining and restraining the said defendant from doing any or all of the acts complained of in this amended bill, and that pending the decision upon the application for a preliminary injunction herein, that the Court may grant an order restraining the said acts until the decision upon the said motion.

And your orator further prays for such other and further relief as may be just, meet and equitable, and for your orator's costs and disbursements.

COLUMBIA VALLEY RAILROAD COMPANY,

ARTHUR C. SPENCER,
RALPH E. MOODY,
Solicitors.

W. W. COTTON,
Of Counsel.

State of Oregon,
County of Multnomah,—ss.

I, L. Gerlinger, being first duly sworn, depose and say: I am the president and managing agent of the complainant, the Columbia Valley Railroad Company, named in the foregoing second amended bill of complaint. I have heard the same read and know the contents thereof, and I believe the same to be true, and that I make this verification as such presi-

dent and managing agent of said orator corporation and for and in its behalf.

L. GERLINGER.

Subscribed and sworn to before me this 15th day of September, 1906.

[Seal] R. MOODY,

Notary Public for Oregon, Residing at Portland, said State.

Rec'd copy this 15th day of September, 1906.

JAMES B. KERR,

Solicitor for Defendant.

[Endorsed]: Second Amended Bill of Complaint. Filed this 17th day of Sept., 1906. A. Reeves Ayres, clerk. By A. N. Moore, Deputy. Refiled in the U. S. Circuit Court, Western Dist. of Washington. Nov. 14, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

In the Circuit Court of the United States for the Western District of Washington.

COLUMBIA VALLEY RAILROAD COMPANY (a Corporation),

Complainant,

vs.

PORTLAND & SEATTLE RAILWAY COMPANY (a Corporation),

Defendant.

Affidavit of P. L. Wise on Motion for Preliminary Injunction.

State of Oregon,
County of Multnomah,—ss.

I, P. L. Wise, being first duly sworn, depose and say, that I am a civil engineer and have had extensive experience in the location, construction and building of railroad lines and grades; that I am familiar and acquainted with the location of the line of the railroad of the Columbia Valley Railroad Company, over the lands described in your orator's second amended bill herein, and that I am also acquainted with the attempted and alleged location of the line of railroad on the said land made by the defendant herein; that the said lines of the defendant conflict with the lines of your orator, and that the construction of a grade upon said defendant's line would in many places over the lands described in your orator's second amended bill, prevent, except at a cost that would be prohibitory, the grading and constructing of a line upon your orator's said located line. That further and continued construction of the grade upon defendant's location, by the defendant, where said defendant is now engaged in constructing its grade upon the land described in your orator's second amended bill, would prevent the

Columbia Valley Railroad Company from constructing and grading its line of railway upon its said located line except at a very great cost, and should the defendant be permitted to enter upon that portion of its attempted located line that is within the limits of the right of way of the Columbia Valley Railroad Company, to construct a grade thereon, at those points where the said Columbia Valley Railroad Company is now engaged in the construction of its railroad upon its located line, as described in your orator's second amended bill, would destroy and injure the said grades thus far constructed by the said Columbia Valley Railroad Company, and would prevent the said Columbia Valley Railroad Company from completing its grade upon said last mentioned premises.

P. L. WISE.

Subscribed and sworn to before me this 15th day of September.

[Seal] R. E. MOODY,

Notary Public for Oregon Residing at Portland, said State.

Service by copy admitted this 15th day of September, 1906.

JAMES B. KERR,

Solicitor for Defendant.

[Endorsed]: Affidavit. Filed this 17th day of Sept. 1906. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

In the Circuit Court of the United States for the Western District of Washington.

THE COLUMBIA VALLEY RAILROAD COMPANY (a Corporation),

Complainant,

vs.

THE PORTLAND & SEATTLE RAILWAY COMPANY (a Corporation),

Defendant.

Affidavit of L. Gerlinger on Motion for Preliminary Injunction.

State of Oregon,
County of Multnomah,—ss.

I, L. Gerlinger, being first duly sworn, depose and say, that at all of the times hereinafter mentioned I was, ever since have been, and now am the duly elected, qualified and acting president of your orator, the Columbia Valley Railroad Company, and that I make this affidavit on behalf of the orator, in the above-entitled proceeding for the purpose of obtaining a restraining order and an injunction in said cause against the above-named defendant, the Port-

land & Seattle Railway Company, a corporation, as prayed for in the second amended bill of your orator filed herein. That your orator, The Columbia Valley Railroad Company, now is and ever since the 16th day of February, 1899, has been a corporation duly organized and existing under and virtue of the laws of the State of Washington, for the purpose of building, equipping, operating and acquiring a railroad and telegraph line from Wallula, on the south bank of the Columbia River, in the State of Washington; thence across at a point at or near Wallula, and thence by some eligible route along the north bank of the Columbia River to a point in the State of Washington on the Columbia River at or near the mouth of the said river; and to maintain, operate, lease, construct and acquire the said railroad and telegraph line or lines, to carry freight and passengers thereon, and transmit messages thereover, and to receive tolls for the carrying and transmitting of the same, and to do all things necessary and proper for the accomplishment of the objects as specified in its articles of incorporation.

That your orator claim and own a right of way over the public lands of the United States, particularly described in your orator's second amended bill which is hereby referred to, under and by virtue of the provisions of an act of Congress approved March 3, 1875, entitled "An act granting to railroads the

right of way through the public lands of the United States," and the regulations of the Secretary of the Interior thereunder. That on the 7th day of April, 1899, your orator, for the purpose of obtaining said right of way, caused a copy of its articles of incorporations and due proof of its organization under the same, duly certified to by the president of your orator, under its corporate seal, to be filed with the Secretary of theInterior, together with a duly certified copy of the laws of the State of Washington, under which said corporation was organized in all respects as required by the said law and the said regulations, and the proper certificate of the officers of said State of Washington, as required by said regulation, that the said articles had been filed with the said officers according to law, with the date of the filing thereof, and that the organization of the said corporation had been complete, and that the company was fully authorized to proceed with the construction of its road according to the existing law of said state, and the certificate by the said L. Gerlinger as president, showing the names and designation of its officers at the time of the filing of the said proofs, and in all respects conforming to the requirements of the said act of Congress and of the said regulations, which was approved by the said Secretary of the Interior. That your orator caused profile maps to be made of its said right of way as aforesaid

and as more fully stated in your orator's second amended bill, which maps were fully approved, and the location of the said line duly approved by the Board of Trustees of your orator corporation, for the purpose of obtaining said right of way, and caused duplicates of said maps to be filed with the Honorable Secretary of the Interior, and in the United States Land Office of the proper district, as more fully appears in your orator's second amended bill to which reference is hereby made, and that the said maps were approved by the Honorable Secretary of the Interior at the date, time and manner, and in the form more fully set forth in your orator's second amended bill, and reference is hereby made to the said bill for greater certainty, and said bill is hereby made a part of this affidavit. That the said right of way traverses the lands described in the X paragraph of your orator's second amended bill. That the said lands, at the time that your orator obtained the said right of way thereover, were public lands of the United States, subject to the said act of Congress described, and that all of the steps were taken by your orator in good faith, for the purpose of constructing a railroad along the said route, and that your orator is prosecuting said construction with all reasonable dispatch, and intends to continue to do so until the said road shall be completed and in operation, and that your orator is now in actual

possession and actively engaged in the construction of its railroad over its said located line as the same traverses the lands described in the XIII paragraph of your orator's second amended bill.

Your affiant further says that the defendant, through its officers, agents, servants and employees, on or about the 29th day of December, 1905, wrongfully, and without right or authority, entered upon the right of way of your orator's line at different points thereon, and particularly upon that portion of your orator's right of way which traverses the lands described in the XIV paragraph of your orator's second amended bill. And that the said defendant, subsequent to the time that your orator had obtained its right of way over the said public lands, and subsequent to the time that your orator had plainly marked its location upon the ground, as more particularly set forth in your orator's second amended bill, and with full knowledge by the defendant of these facts, and the rights of your orator, the said defendant wrongfully, unlawfully, and without right or authority, attempted to locate upon said public land within the limits of your orator's right of way, for the purpose of constructing, building and operating and railroad thereon and for the further purpose of hindering, delaying, and preventing your orator from building, constructing and operating a railroad upon your orator's fixed and lo-

cated line; and that the said defendant is now engaged in the construction of a grade upon said defendant's attempted location, and if the defendant is permitted and allowed to grade and to construct its line upon its said attempted location, it will, on a great part thereof prevent your orator from constructing its railroad upon its located line, except at a cost that makes it absolutely prohibitory, and that the defendant threatens to and intends, and will, unless restrained by your Honors, continue the consruction of its grade upon said defendant's attempted location, to the irreparable injury and damage of your orator; and that the said acts interfere with your orator in the construction and operation of its road, and prevent your orator from using the same, and to permit the defendant to continue in its act of trespass and waste, your orator will be prevented irreparably from prosecuting or carrying out the purposes of its incorporation, and of the building and operating of the railroad upon its located and fixed line over the lands aforesaid. That the defendant intends and threatens, and will unless restrained by your Honors, to enter in and upon that portion of your orator's right of way which traverses the lands described in paragraph XIII of your orator's second amended bill, and upon which your orator is now actively engaged in the construction of its railroad, and that the defendant will upon such

entry, injure and destroy the work performed and being performed by your orator upon its said right of way over the last described premsies, to your orator's irreparable injury and damage.

L. GERLINGER.

Subscribed and sworn to before me this 15 day of September, 1906.

[Seal] R. E. MOODY,
Notary Public for Oregon Residing at Portland, said State.

Service by copy admitted this 15th day of September, 1906.

JAMES B. KERR,
Solicitor for Defendant.

[Endorsed]: Affidavit. Filed this 17th day of Sept. 1906. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

In the Circuit Court of the United States for the Western District of Washington.

THE COLUMBIA VALLEY RAILROAD COMPANY (a Corporation),

Complainant,

vs.

PORTLAND AND SEATTLE RAILWAY COMPANY (a Corporation),

Defendant.

Motion for Preliminary Injunction.

Comes now the complainant and moves the Court to grant a preliminary injunction against the defendant herein, as prayed for in complainant's second amended bill. This motion is based upon complainant's second amended bill, and the affidavits of L. Gerlinger and P. L. Wise filed herein.

RALPH E. MOODY,
Solicitor.

Service by copy admitted this 15th day of September, 1906.

JAMES B. KERR,
Solicitor for Defendant.

[Endorsed]: Motion for Preliminary Injunction. Filed this 17th day of Sept. 1906. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

In the Circuit Court of the United States for the Western District of Washington.

THE COLUMBIA VALLEY RAILROAD COMPANY (a Corporation),

Complainant,

vs.

PORTLAND AND SEATTLE RAILWAY COMPANY (a Corporation),

Defendant.

Notice of Application for Preliminary Injunction.

To the Portland & Seattle Railway Co., Defendant:

You are hereby notice that the complainant will apply to the above-entitled court on the 25th day of September, 1906, at the hour of 10 o'clock, A. M., or as soon thereafter as counsel can be heard, for a preliminary injunction against the defendant, as prayed for in complainant's second amended complaint, which application and motion will be based upon said second amended bill, and the affidavits of L. Gerlinger and P. L. Wise, copies of which are herewith served upon you.

RALPH E. MOODY,

Solicitor.

Service by copy admitted this 15th day of September, 1906.

JAMES B. KERR,
Solicitor for Defendant.

[Endorsed]: Notice of Application for Preliminary Injunction. Filed this 17th day of Sept. 1906. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division, Sitting at Seattle.

COLUMBIA VALLEY RAILROAD COMPANY,
Complainant,

vs.

PORTLAND AND SEATTLE RAILWAY COMPANY,
Defendant.

Motion to Vacate Order Allowing Filing of Second Amended Complaint and for Order to Strike Second Amended Compaint.

Comes now the defendant above named and moves the Court for an order vacating the order heretofore entered herein allowing the complainant leave to file a second amended bill of complaint herein, upon the ground that said order was entered without notice

to the defendant as required by the rules of this court.

The defendant further moves the Court for an order to strike from the files of this court the second amended bill of complaint herein, upon the ground that the same contains matters and things by way of amendment not permitted by the order heretofore entered in this cause authorizing the filing of a second amended bill of complaint, in this, that said bill of complaint sets out by way of amendment matters and things happening after the commencement of this suit.

JAMES B. KERR,
GEORGE T. REID,
Solicitors for Defendant.

Due service of within motion is hereby accepted this —— day of October, 1906, with receipt of copy thereof. See stipulation filed herewith.

_____,
Solicitor for Compl't.

[Endorsed]: Motion of Deft. to strike 2d Am. Bill from Files and to Vacate Order Allowing Same to be Filed. Filed in the U. S. Circuit Court, Western Dist. of Washington. Oct. 24, 1906. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep.

In the Circuit Court of the United States for the Western District of Washington, Northern Division, Sitting at Seattle.

COLUMBIA VALLEY RAILROAD COMPANY,
Complainant,

vs.

PORTLAND AND SEATTLE RAILWAY COMPANY,
Defendant.

Stipulation Relative to Motion to Strike Second Amended Complaint, etc.

It is hereby stipulated by and between the parties hereto that service is hereby admitted of a copy of the motion of the defendant filed herein to vacate the order of this Court permitting the filing of a second amended bill of complaint, and to strike from the files of this court the second amended bill of complaint filed herein.

It is further stipulated that said motion shall be argued and submitted at some time to be hereafter agreed upon between the respective parties, and that the time of the defendant to plead, answer, or demur

to the amended bill of complaint shall be extended until after the decision of the court upon said motion.

Dated October 22, 1906.

RALPH E. MOODY,
Solicitor for Complainant.
JAMES B. KERR,
GEORGE T. REID,
Solicitors for Defendant.

[Endorsed]: Stipulation re Motion of Deft. to Strike 2d Am. Bill from Files, etc. Filed in the U. S. Circuit Court, Western Dist. of Washington, Oct. 24, 1906. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep.

Circuit Court of the United States, Western District of Washington.

COLUMBIA VALLEY RAILROAD COMPANY,
Complainant,

vs.

PORTLAND & SEATTLE RAILWAY COMPANY,
Defendant.

Order Granting Motion to Strike Second Amended Complaint, etc.

The motion of the defendant to strike from the files herein the second amended bill of complaint coming on to be heard, it is hereby ordered that the

same is hereby granted, and said second amended bill is hereby ordered to be so stricken by the Court.

Dated Nov. 14, 1906.

C. H. HANFORD,
Judge.

[Endorsed]: Order to Strike 2d Amended Bill of Complaint. Filed in the U. S. Circuit Court, Western Dist. of Washington. Nov. 14, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

In the Circuit Court of the United States for the Western District of Washington.

THE COLUMBIA VALLEY RAILROAD COMPANY (a Corporation),

Complainant,

vs.

PORTLAND AND SEATTLE RAILWAY COMPANY,

Defendant.

Order Granting Application to File Second Amended Complaint.

Now on this 14th day of November, 1906, the application to file a second amended bill having come regularly on, the plaintiff appearing by its attorneys, W. W. Cotton and Ralph E. Moody, and the defendant appearing by its attorneys, James B. Kerr and

Geo. T. Reid, and the Court being fully advised in the premises, it is hereby ordered that the application to file said amended bill be, and the same is hereby, granted, the leave to file said amended bill is upon the condition that complainant pay to defendant the sum of ten dollars.

C. H. HANFORD,
Judge.

[Endorsed]: Order to file 2d Am. Bill of Complaint. Filed in the U. S. Circuit Court, Western Dist. of Washington. Nov. 14, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

In the Circuit Court of the United States for the Western District of Washington, Northern Division, Sitting at Seattle.

IN EQUITY.

COLUMBIA VALLEY RAILROAD COMPANY,
Complainant,

vs.

PORTLAND AND SEATTLE RAILWAY COMPANY,
Defendant.

Demurrer to Second Amended Bill of Complaint.

Comes now the defendant above named and demurs to the second amended bill of complaint herein, and for grounds of demurrer specifies:

First.—That this Court has no jurisdiction in the above-entitled cause;

Second.—That said second amended bill of complaint does not state facts which entitle the complainant to relief;

Third.—That said second amended bill of complaint is in the nature of a supplemental bill of complaint, and the original bill on file herein fails to state facts which entitle the complainant to relief;

Fourth.—That it appears upon the face of said second amended bill of complaint that the complainant has been guilty of such laches in the prosecution of this cause that it is not entitled to the relief sought.

JAMES B. KERR,
GEORGE T. REID,
Solicitors for Defendant.

United States of America,
Western District of Washington,
County of Clarke,—ss.

James B. Kerr, being duly sworn, on oath says: That he is an officer, to wit, the assistant secretary

of the Portland and Seattle Railway Company, defendant above named, and makes this affidavit for and on its behalf; that the foregoing demurrer is not interposed for the purpose of delay.

JAMES B. KERR.

Subscribed and sworn to before me this 12th day of November, 1906.

[Seal] H. A. SMITH,

Notary Public for Washington, Residing at Vancouver, in Clarke County.

I, James B. Kerr, solicitor for the defendant above named, hereby certify that the foregoing demurrer is, in my opinion, in point of law well taken.

JAMES B. KERR,
Solicitor for Defendant.

[Endorsed]: Demurrer to Second Amended Bill of Complt. Filed in the U. S. Circuit Court, Western Dist. of Washington. Nov. 14, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

In the Circuit Court of the United States for the Western District of Washington, Sitting at Seattle.

COLUMBIA VALLEY RAILROAD COMPANY,
Complainant,

vs.

PORTLAND AND SEATTLE RAILWAY COMPANY,
Defendant.

Order Sustaining Demurrer to Second Amended Complaint.

The demurrer of defendant to the second amended bill of complaint is hereby sustained.

Dated Nov. 14, 1906.

C. H. HANFORD,
Judge.

Complainant excepts and the exception is allowed:

[Endorsed]: Order Sustaining Demurrer to 2d Amended Bill of Complaint. Filed in the U. S. Circuit Court, Western Dist. of Washington. Nov. 14, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

In the Circuit Court of the United States for the Western District of Washington.

No. 1384.

THE COLUMBIA VALLEY RAILROAD COMPANY (a Corporation),

Complainant,

vs.

PORTLAND & SEATTLE RAILWAY COMPANY (a Corporation),

Defendant.

Decree.

This Court having heretofore sustained a demurrer to the second amended bill of the complainant, upon the ground that this Court was without jurisdiction in the premises, in that the bill failed to state facts sufficient to justify the interposition of the court of equity, and the complainant declining and refusing to further plead, but electing to stand upon the allegations contained in its second amended bill:

Now, therefore, it is hereby ordered, adjudged and decreed that this cause be, and the same is hereby dismissed upon the ground and for the reason that this Court has no jurisdiction in the premises,

in that the bill of complaint of complainant fails to state facts sufficient to entitle the complainant to equitable relief, and it is further ordered that the defendant have judgment against the complainant for its costs and disbursements herein, taxed at the sum of ——— dollars.

C. H. HANFORD,

Judge of the Circuit Court of the United States for the Western District of Washington.

[Endorsed]: Decree. Filed this 11th day of Feb., 1907. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

In the Circuit Court of the United States for the Western District of Washington.

THE COLUMBIA VALLEY RAILROAD COMPANY (a Corporation),

Complainant,

vs.

THE PORTLAND AND SEATTLE RAILWAY CO. (a Corporation),

Defendant.

Petition for Appeal.

The Columbia Valley Railroad Company, the above-named complainant, conceiving itself aggrieved by the final decree, order and judgment, en-

tered in the above-entitled cause, on the 11th day of February, 1907, hereby appeals from said final decree, order and judgment, and the whole thereof, to the United States Circuit Court of Appeals of the Ninth Circuit, and the Columbia Valley Railroad Company, prays that this, its appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, may be allowed, and that a transcript of the record and proceeding and papers, upon which said final decree, order and judgment were made, duly authenticated, may be sent to said United States Circuit Court of Appeals for the Ninth Circuit.

And now at the time of filing this petition for appeal, the Columbia Valley Railroad Company, appellant, files an assignment of errors, setting up separately and particularly, each error asserted and intended to be urged in the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

Dated at Portland, Oregon, this 6 day of August, 1907.

THE COLUMBIA VALLEY RAILROAD CO.

Appellant.

By W. W. COTTON,

RALPH E. MOODY,

Solicitors.

[Endorsed]: Petition for Appeal. Filed this 9th day of August, 1907. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

In the Circuit Court of the United States for the Western District of Washington.

THE COLUMBIA VALLEY RAILROAD COMPANY (a Corporation),

Complainant,

vs.

THE PORTLAND AND SEATTLE RAILWAY CO. (a Corporation),

Defendant.

Order Allowing Appeal.

Now on this 9th day of August, 1907, the petition of the complainant, The Columbia Valley Railroad Company, for and order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree, order and judgment, rendered in this cause, by this Court on the 11th day of February, 1907, coming on regularly for hearing; and the Court being fully advised in the premises;

It is hereby ordered that the said appeal be and the same is hereby allowed.

C. H. HANFORD,

Judge of the Circuit Court of the United States, for the Western District of Washington.

[Endorsed]: Order Allowing Appeal. Filed this 9th day of August, 1907. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

In the Circuit Court of the United States for the Western District of Washington.

THE COLUMBIA VALLEY RAILROAD COMPANY (a Corporation),

Complainant,

vs.

THE PORTLAND AND SEATTLE RAILWAY CO. (a Corporation),

Defendant.

Assignment of Errors.

The Columbia Valley Railroad Company, the above-named complainant, having this day petitioned for an appeal from the final decree, order and judgment, entered in the above-entitled action, on the 11th day of February, 1907, hereby submits and herewith files its assignment of errors, asserted and intended to be urged in the United States Circuit Court of Appeals for the Ninth Circuit.

Comes now the said Columbia Valley Railroad Company, by its solicitors, and says that in the record and proceedings aforesaid, there is manifest error in this:

I.

That the United States Court for the Western District of Washington, erred in holding that complainant's second amended bill of complaint failed to state facts sufficient to justify the interposition of a court of equity, and that said court erred in holding that the complainant's remedy was at law.

II.

That the said Court erred in sustaining the demurrer of the defendant, to the complainant's second amended bill of complaint.

III.

That the said Court erred in making and entering an order sustaining the said defendant's demurrer to compainant's second amended bill of complaint.

IV.

That the Court erred in signing and entering a judgment and decree in favor of the defendant and against the complainant, dismissing this cause and suit and giving the judgment in favor of defendant and against the complainant for costs.

The said The Columbia Valley Railroad Company prays that the judgment, order and decree aforesaid may be reversed.

COLUMBIA VALLEY RAILROAD CO.,
Appellant.
By W. W. COTTON,
RALPH E. MOODY,
Solictors.

[Endorsed]: Assignment of Errors. Filed this 9th day of August, 1907. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

In the Circuit Court of the United States for the Western District of Washington.

THE COLUMBIA VALLEY RAILROAD COMPANY,

Complainant,

vs.

THE PORTLAND & SEATTLE RAILWAY COMPANY,

Defendants.

Bond on Appeal.

Know all men by these presents, that we, The Columbia Valley Railroad Company, a corporation, and the United States Fidelity & Guaranty Company, of Baltimore, Maryland, are held and firmly bound unto the Portland & Seattle Railway Company, for the sum of five hundred ($500) dollars, to be paid to the said Portland & Seattle Railway Company, its successors or assigns. To which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors or assigns, firmly by these presents.

Sealed with our seals and dated this 7th day of August, 1907.

Whereas, the above named, Columbia Valley Railroad Company, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause, by the Circuit Court of the United States, for the Western District of Washington.

Now, therefore, the condition of this obligation is such, that if the above-named Columbia Valley Railroad Company, appellant, shall prosecute said appeal to effect, and answer all costs awarded against it, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

COLUMBIA VALLEY R. R. CO.,
By L. GERLINGER,
President.

E. W. M. RANDS,
Secretary C. V. R. R. Co.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By JOHN P. HARTMAN, [Seal]
Its Attorney in Fact.

Signed, sealed and delivered in the presence of us as witnesses:

[Seal] E. E. MOODY,
M. E. TODD.

The foregoing bond is hereby approved.

Done in open court this 9th day of August, 1907.

C. H. HANFORD,
Judge.

[Endorsed]: Bond. Filed this 9th day of August, 1907. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1384.

COLUMBIA VALLEY RAILWAY COMPANY,
Complainant,

vs.

PORTLAND & SEATTLE RAILWAY COMPANY,
Defendant.

Citation on Appeal (Copy).

The President of the United States of America to Portland & Seattle Railway Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco, State of California, within thirty (30) days from the date of this writ, to wit, on the 8th day of September, 1907, pursuant to a notice of appeal and order of the Court allowing the same, filed in the clerk's office of the Circuit Court of the United States for the Western District of Washington, Northern Division, wherein Columbia Valley Railroad Company is complainant and now appellant, and you are defendant and appellee, to show cause, if any there be, why the judgment rendered against the said complainant and appellant, as in said notice of appeal and order allowing the same mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States of America, this 9th day of August, 1907, and of the Independence of the United States the one hundred and thirty-second.

[Seal] C. H. HANFORD,
United States District Judge, Presiding in said Court.

Due and personal service of the above citation and the receipt of a copy thereof is hereby admitted this 10th day of August, 1907.

JAMES B. KERR,
Attorney for Portland & Seattle Railway Company.

[Endorsed]: Citation. Filed in the U. S. Circuit Court, Western Dist. of Washington. Aug. 14, 1907. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

In the United States Circuit Court for the Western District of Washington.

THE COLUMBIA VALLEY RAILROAD COMPANY (a Corporation),
Complainant and Appellant,

vs.

THE PORTLAND AND SEATTLE RAILWAY COMPANY (a Corporation),
Defendant and Appellee.

Stipulation for Record on Appeal.

It is hereby stipulated and agreed by and between the complainant and appellant, the Columbia Valley Railroad Company, and the defendant and appellee, the Portland and Seattle Railway Company, that the record on appeal in this cause, and upon which this cause shall be heard and determined in

the Circuit Court of Appeals in the Ninth Circuit, shall be as follows:

Bill of complaint and appearance, filed February 2, 1906.

Demurrer of defendant to complaint, filed February 23, 1906.

Order sustaining demurrer and thirty days allowed to amend bill, February 23, 1906.

Amended bill of complaint, filed March 28, 1906.

Demurrer of defendant to amended bill of complaint, filed April 2, 1906.

Supplemental bill of complaint, filed August 1, 1906.

Motion for preliminary injunction, affidavit in injunction, notice filed August 1, 1906.

Demurrer of defendant to supplemental bill, filed August 7, 1906.

Memorandum of decision on application for injunction, filed September 5, 1906.

Order granting leave to file second amended bill, filed September 8, 1906.

Second amended bill of complaint, two affidavits, filed September 17, 1906.

Motion for preliminary injunction and notice, filed September 17, 1906.

Motion of defendant to strike second amended bill, stipulation, filed October 24, 1906.

Order to strike second amended bill, filed November 14, 1906.

Order granting leave to re-file second amended bill, filed November 14, 1906.

Second amended bill, re-filed November 14, 1906.

Demurrer to second amended bill, filed November 14, 1906.

Order sustaining demurrer to second amended bill, filed November 14, 1906.

Decree dismissing the cause, filed February 11, 1907.

Petition for appeal, order allowing appeal, assignment of errors, and bond, filed August 9, 1907.

Citation on appeal, with acceptance of service thereon, and this stipulation filed August 14, 1907.

It is hereby stipulated and agreed that this cause shall be heard and determined in the Court of Appeals aforesaid upon the foregoing record, briefs of respective parties, and oral argument.

It is hereby further stipulated and agreed that the clerk of the Court shall certify that the foregoing transcript shall constitute the entire record of this cause in the lower court.

Dated at Portland, Oregon, this 12th day of August, 1907.

RALPH E. MOODY,
Attorney for Complainant and Appellant.

JAMES B. KERR,
Attorney for Defendant and Appellee.

[Endorsed]: Stipulation. Filed in the U. S. Court, Western Dist. of Washington. Aug. 14, 1907. A. Reeves Ayres, Clerk. W. D. Covington, Dep.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1384.

COLUMBIA VALLEY RAILROAD COMPANY,
Complainant,

vs.

PORTLAND & SEATTLE RAILWAY COMPANY,
Defendant.

Praecipe for Transcript of Record.

To the Clerk of said Court:

For transcript on appeal to the Circuit Court of Appeals, you will please include the following:

Bill of complaint and appearance, filed February 2, 1906.

Demurrer of defendant to complaint, filed February 23, 1906.

Order sustaining demurrer and thirty days allowed to amend bill, February 23, 1906.

Amended bill of complaint, filed March 28, 1906.

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Second amended bill, re-filed November 14, 1906.

Demurrer to second amended bill, filed November 14, 1906.

Order sustaining demurrer to second amended bill, filed November 14, 1906.

Decree dismissing the cause, filed February 11, 1907.

Petition for appeal, order allowing appeal, assignment of errors and bond, filed August 9, 1907.

Citation on appeal, with acceptance of service thereon and stipulation, filed this day.

This praecipe.

W. W. COTTON and
R. E. MOODY, J. P.
Attorneys for Complainant.

[Endorsed]: Praecipe. Filed in the U. S. Circuit Court, Western Dist. of Washington. Aug. 14, 1907. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1384.

THE COLUMBIA VALLEY RAILROAD COMPANY (a Corporation),
Complainant and Appellant,

vs.

THE PORTLAND AND SEATTLE RAILWAY COMPANY (a Corporation),
Defendant and Appellee.

Clerk's Certificate to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, A. Reeves Ayres, Clerk of the Circuit Court of the United States for the Western District of Washington, do hereby certify the foregoing one hundred and twenty-eight (128) typewritten pages, numbered from 1 to 128, inclusive, to be a full, true and correct copy of the record and proceedings in the above and therein entitled cause as the same remain of record and on file in the office of the clerk of said court, and that the same constitute the record and appeal from the order, judgment and decree of the Circuit Court of the United States for the Western District of Washington, in said appeal mentioned.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause.

I further certify that the cost of preparing the foregoing record on appeal is the sum of $113.20, and that the said sum has been paid to me by W. W. Cotton and Ralph E. Moody, solicitor for the complainant and appellant.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Circuit Court, this 31st day of August, 1907.

[Seal] A. REEVES AYRES,
Clerk.

By R. M. Hopkins,
Deputy Clerk.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 1384.

COLUMBIA VALLEY RAILROAD COMPANY,
Complainant,

vs.

PORTLAND & SEATTLE RAILWAY COMPANY,
Defendant.

Citation on Appeal (Original).

The President of the United States of America to Portland & Seattle Railway Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, State of California, within thirty (30) days from the date of this writ, to wit, on the

8th day of September, 1907, pursuant to a notice of appeal and order of the court allowing the same, filed in the clerk's office of the Circuit Court of the United States for the Western District of Washington, Northern Division, wherein Columbia Valley Railroad Company is complainant and now appellant, and you are defendant and appellee, to show cause, if any there be, why the judgment rendered against the said complainant and appellant, as in said notice of appeal and order allowing the same mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States of America, this 9th day of August, 1907, and of the Independence of the United States the one hundred and thirty-second.

[Seal] C. H. HANFORD,
United States District Judge, Presiding in said Court.

Due and personal service of the above citation and the receipt of a copy thereof is hereby admitted this 10th day of August, 1907.

JAMES B. KERR,
Attorney for Portland & Seattle Railway Company.

[Endorsed]: No. 1384. In the United States Circuit Court for the District of Washington, Northern Division. Columbia Valley R. R. Co., Complainant, vs. Portland & Seattle Ry. Co., Defendant. Citation. Filed in the U. S. Circuit Court, Western Dist. of Washington. Aug. 14, 1907. A. Reeves Ayres, Clerk. A. N. Moore, Dep. John P. Hartman, Attorney for ———, Burke Building, Seattle.

[Endorsed:] No. 1500. United States Circuit Court of Appeals for the Ninth Circuit. The Columbia Valley Railroad Company, Appellant, vs. The Portland & Seattle Railway Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States Circuit Court for the Western District of Washington, Northern Division.

Filed September 6, 1907.

FRANK D. MONCKTON,

Clerk.

By Meredith Sawyer,

Deputy Clerk.

No. 1500

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COLUMBIA VALLEY RAILROAD COMPANY, a corporation

APPELLANT

V.

PORTLAND & SEATTLE RAILWAY COMPANY, a corporation

APPELLEE

On appeal from the Order and Judgment of the United States Circuit Court for the District of Washington

Brief of Appellant

W. W. COTTON
RALPH E. MOODY
For Appellant

JAMES B. KERR
For Appellee

IN THE

United States Circuit Court of Appeals For the Ninth Circuit

COLUMBIA VALLEY RAILROAD COMPANY,
a Corporation,
Appellant,

v.

PORTLAND AND SEATTLE RAILWAY COMPANY,
a Corporation,
Appellee.

Brief of Appellant

STATEMENT OF CASE

The appellant, the Columbia Valley Railroad Company, is a railroad corporation, organized as such, on the 16th day of February, 1899, for the purpose of building, equipping and operating a railroad from Wallula, on the south bank of the Columbia River, in the State of Washington, thence across the Columbia River at a point near Wallula, and thence by some eligible route along the north bank of the Columbia River, to a point in the State of Washington, on the Columbia River, at or near the mouth of the said river.

The line of appellant's railroad crosses over public

lands of the United States, and in December, 1899, appellant secured a right of way over said public lands by compliance with the act of Congress granting to railroads the right of way through public lands, approved March 3, 1875.

18 U. S. Statutes, 482;

2 U. S. Compiled Statutes, 1901, page 1568.

The sections of such act, pertinent to this inquiry, are sections 1 and 4, which are as follows, to-wit:

Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take from the public lands adjacent to the line of said road, material, earth, stone and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

Section 4. That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey

thereof by the United States, file with the Register of the Land Office for the district where such land is located a profile of its road; and, upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way; provided, that if any section of said road shall not be completed within five years after the location of said section the rights herein granted shall be forfeited as to any such uncompleted section of said road.

The appellee, the Portland and Seattle Railway Company, is a railroad corporation, organized for the purpose of constructing and maintaining a railroad from Spokane, Washington, down the north bank of the Columbia River to Vancouver, Washington, and thence to Portland, Oregon.

Appellee disputes the right and title of appellant's right of way over the said public lands, upon the ground that more than five years have elapsed since the location of the said right of way upon said public lands, and that the said railroad has not been completed within five years from the said location; and claims and pretends that under and by virtue of the provisions of the act of March 3, 1875, the right and title of appellant to the right of way over said public lands were and are forfeited; claims said alleged forfeiture under and by virtue of the provisions of Section 4, of said act of March 3, 1875; claims failure of appellant to complete its said railroad within the five years provided for in said act, and without any judicial or congressional action work such forfeiture; and

appellee further pretends and claims the right to go upon the right of way of appellant, and to build its railroad thereon, by virtue of various acts of Congress and by virtue of deeds from settlers of the land, made subsequent to appellant's compliance with the act of March 3, 1875; and the location of its road upon said public lands, all of which claims of appellee are fully set forth in appellant's Second Amended Bill of Complaint (Record, page), said Second Amended Bill of Complaint is hereby referred to and made part hereof for all purposes.

Subsequent to the securing and acquiring by appellant of its right of way over the public lands involved in this controversy, and subsequent to and with knowledge of the location upon ground of appellant's railroad, appellee wrongfully and without authority, and without the consent of the appellant, entered upon a part of the right of way secured by appellant over said lands, and attempted to make a location upon appellant's right of way and proceeded, wrongfully and without authority, to survey and locate a railroad, and to construct a railroad grade thereon; sent and placed men, teams and apparatus thereon, and engaged in excavating ground thereon; making fills, cuts and embankments, with intent to construct and operate a line of railroad over appellant's said right of way, destroying the use of the said right of way, so that appellant could not construct its railroad thereon. Appellant was at the time engaged in the construction of its railroad upon a portion of said right of way described in the said Amended Bill of Complaint, and appellee threatened to wrongfully enter in and upon that portion of the said right of way, which was then in the actual possession

of the appellant, and destroy the railroad grade of the appellant then being constructed and the portion completed, and make it impossible for the appellant to further construct its railroad upon its said right of way. Said several acts of trespass and threatened trespass are alleged in detail, in the Second Amended Bill of Complaint, which is hereby referred to and made a part of this statement. The acts of trespass of the appellee upon said right of way, and threatened trespass are continuing and destroying the right of way of the appellant, preventing it from constructing its line of railroad, to the appellant's irreparable injury and damage.

The Second Amended Bill of Complaint seeks to have the appellee restrained and enjoined from its said acts of trespass and threatened trespass.

Appellee filed a General Demurrer to appellant's Second Amended Bill, which was sustained by the Circuit Court; and appellant, refusing to further plead, but electing to stand upon its Second Amended Bill of Complaint, the Circuit Court entered a judgment against appellant dismissing the suit and awarding costs in favor of appellee, from which judgment appellant now appeals to this Court.

ASSIGNMENT OF ERRORS

I.

That the Circuit Court erred in holding that appellant's Second Amended Bill of Complaint failed to state facts sufficient to justify the interposition of a Court of Equity, and said Court erred in holding that appellant's remedy was at law.

II.

That the Circuit Court erred in sustaining appellee's demurrer to appellant's Second Amended Bill of Complaint.

III.

That the Circuit Court erred in making and entering an order sustaining appellee's demurrer to appellant's Second Amended Bill of Complaint.

IV.

That the Circuit Court erred in signing and entering a judgment in favor of appellee and against appellant, dismissing this cause and giving judgment in favor of the appellee.

POINTS AND AUTHORITIES

The grant of a right of way over the public lands of the United States by the act of March 3, 1875, was a grant in praesenti.

Railroad Co. v. Baldwin, 103 U. S. 426;
Bybee v. Ore. & Calif. R. R. Co., 139 U. S. 679;
N. P. R. Co. v. Hasse, 197 U. S. 10;
Wallula Pacific Ry. Co. v. Port. & Seattle Ry Co.,
— Fed. —

The first section of the act of March 3, 1875, contains words of present grant, but there is no definite grantee. A railroad company becomes specifically a grantee by filing its articles of incorporation and due proofs of organization under the same with the Secretary of the Interior.

Jamestown & N. Ry. Co. v. Jones, 177 U. S. 130.

The condition provided for in section 4 of the act of March 3, 1875, is a condition subsequent, and if a breach

of the condition occurs the estate will not revest in the grantor unless he takes advantage of the breach and makes an entry or its equivalent.

Schulenberg v. Harriman, 21 Wall. 44.

A breach of a condition subsequent does not ipso facto produce a revertor of title.

Ruch v. Rock Island, 97 U. S. 693-6;
Utah Etc. R. R. v. Utah Etc. Ry. Co., 110 Fed. 890;
Nickoll v. N. Y. & E. R. R. Co., 12 N. Y. 121;
Anderson et al. v. Boch, 15 How. 323.

No one can take advantage of the nonperformance of a condition subsequent annexed to an estate but the grantor or his heirs, or the successor of the grantor if the grant proceeded from an artificial person, and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee.

Southard v. Central R. R. Co., 26 N. J. L. 13.

The same doctrine obtains where the grant upon condition proceeds from the Government. No individual can assail the title which is conveyed on the ground that the grantee has failed to perform the condition annexed.

Schulenberg v. Harriman, 21 Wall. 44;
Van Wicks v. Knevals, 106 U. S. 360;
N. P. R. R. Co. v. Majors, 5 Mont. 136, 2 Pac. 332;
U. S. v. Will. Valley & C. M. Wagon Road, 55 Fed. 711;
Nickoll v. N. Y. & E. R. R. Co., 12 N. Y. 121;
Dewey v. Williams, 40 N. H. 222;
Shepherd's Touchstone, 149.

General demurrer admits the truth of the allegations of fact in the bill so far as the same are well pleaded.

1 Foster's Fed. Practice, Sec. 108;

1 Bates' Fed. Equity Procedure, Sec. 178.

Equity has jurisdiction by injunction to prevent and restrain trespass and interference with easements or property, or their disturbance or their destruction, actual or threatened.

Pomeroy's Equitable Remedies, Secs. 493-4-5 and 6, and 505;

Louisville & N. R. Co. v. Smith, 128 Fed. 1;

N. P. R. R. Co. v. Cunningham, 103 Fed. 718;

Am. Mill & Mining Co. v. Warren et al., 82 Fed. 522;

Burl. v. Schwarzmer, 52 Con. 181-4;

Stanford v. Stanford Horse R. Co., 56 Conn. 381-393;

N. Y. & N. H. & Hart. R. R. Co. v. Scovill, 71 Conn. 136-148;

U. S. Freehold & Emigration Co. v. Gallegos, 89 Fed. 769;

King v. Stewart et al., 84 Fed. 546;

Irwin v. Fulk et al., 94 Ind. 235;

Birmingham Traction Co. v. Sou. Bell T. & T. Co., 119 Ala. 144;

Edwards v. Hagaer, 180 Ill. 99-108.

Court of equity will grant an injunction restraining trespass, even though the title to property may be in dispute.

Cheesman et al. v. Shreve et al., 37 Fed. 36;

Wilson et al. v. Rockwell et al., 29 Fed. 674.

Parties have no right to take remedy into their own hands and seize property.

Western Un. v. St. Joseph & Wn. Ry. Co., 3 Fed. 430.

If possession of defendant is mere interruption of prior possession of plaintiff, interruption will be remedied by injunction if right is clear and certain without forcing plaintiff to establish title at law.

16 Am. & Eng. Ency. of Law, 2d Ed., 365;

In re Conway, 4 Arkansas 302;

Pokegama Sugar Pine Lbr. Co. v. Klamath River Lbr. & Imp. Co., 86 Fed. 528-533-534.

ARGUMENT

The Supreme Court of the United States has had occasion in several cases to consider the effect of grants of right of way, as compared with grants of land, and has uniformly held that an act of Congress containing words similar to those found in the first section of the act of 1875, referred to in the Statement of the Case, was a grant in praesenti, and took effect as against all intervening claimants, as of the date of the act, and that such grant granted a right of way over any public lands of the United States along the general route mentioned in the articles of incorporation, and that every person seeking to acquire title to such public lands after passage of the act took such lands subject to the possible right of the company to use the lands for right of way purposes.

Railroad Co. v. Baldwin, 103 U. S. 426;

Bybee v. Ore. & Calif. R. R. Co., 139 U. S. 679;

N. P. Ry. Co. v. Hasse, 197 U. S. 10.

The first section of the act of March 3, 1875, contains words of present grant, but there is no definite grantee. A railroad company, however, becomes specifically a grantee by filing its articles of incorporation and due proofs of organization under the same, with the Secretary of the Interior.

Jamestown & N. Ry. Co. v. Jones, 177 U. S. 130.

The first section of this act was construed by Judge Whitson, in the United States Court for the Eastern District of Washington, in the case of Wallula Pacific Ry. Co. v. Portland & Seattle Co., — Fed. Rep. —, wherein he holds as follows:

"Similar language to that used in this act, namely: 'the right of way to the public lands of the United States is hereby granted,' etc., has been uniformly construed by the Supreme Court as a grant in praesenti."

As the demurrer in this case admits that the appellant has taken the necessary steps in order to secure right of way over the public lands under the said act of March 3, 1875, it follows that the right of way of appellant over said public lands has been granted, and that the appellant is the owner thereof. It is likewise conceded that the appellant has complied with section 4 of the act of March 3, 1875, supra, and even though appellant's road was not completed within five years after location, or within five years after the filing and approval of its maps, the title to said right of way remains unimpaired in the appellant.

It is elementary that where an estate in lands vests under a present grant, subject to a condition subsequent, and a breach of the condition occurs, the estate will not

revest in the grantor, unless he takes advantage of the breach, and makes an entry or its equivalent.

Schulenberg v. Harriman, 21 Wall. 44.

A breach of a condition subsequent does not ipso facto produce a revertor of title.

Ruch v. Rock Island, 97 U. S. 693-6;

Utah Etc. R. R. Co. v. Utah Etc. Ry. Co., 110 Fed. 879;

Nickoll v. N. Y. & E. R. R. Co., 12 N. Y. 121;

Anderson et al. v. Boch, 15 How. 323.

Judge Hawley, in the case of Utah N. & C. R. Co. v. Utah & C. Ry. Co. et al., 110 Federal Reporter 879, in construing section 4 of the said act of March 3, 1875, observes on page 890:

"The Supreme Court of the United States has uniformly held, in construing various acts of Congress containing similar provisions to the act of 1875, that the failure to complete the road within the time limited is treated as a condition subsequent, not operating ipso facto as a revocation of the grant, but as authorizing the Government itself to take advantage of it, and forfeit the grant by judicial proceeding, or by an act of Congress resuming title to the lands."

Therefore, it becomes immaterial, so far as this cause is concerned, whether the appellant has committed a breach of the conditions of section 4. The appellee cannot question appellant's title upon that ground, as the Government has not. It is a fundamental rule of law that no one can take advantage of the nonperformance of a condition subsequent, annexed to an estate in fee, but the grantor or his heirs, or the successor of the grantor, if the

grant proceed from an artificial person, and if they do not see fit to assert their right to enforce a forfeiture on that ground the title remains unimpaired in the grantee.

Southard v. Central R. R. Co., 26 N. J. L. 13.

In Schulenberg v. Harriman supra, the Supreme Court, after announcing the foregoing rule, observes:

"The authorities on this point, with hardly an exception, are all one way from the Year Books down. And the same doctrine obtains where the grant upon condition proceeds from the Government; no individual can assail the title it has conveyed on the ground that the grantee has failed to perform the conditions annexed."

Van Wicks v. Knevals, 106 U. S. 360;

N. P. R. R. Co. v. Majors, 5 Mont. 136, 2 Pac. Rep. 332;

United States v. Willamette Valley & C. M. Wagon Road, 55 Fed. 711;

Nickoll v. N. Y. & E. R. R. Co., 12 N. Y. 121;

Dewey v. Williams, 40 N. H. 222;

Shepard's Touchstone, 149.

Under the foregoing authorities there can be no question but that the appellant is the owner of and entitled to the possession of the right of way involved in this suit, and therefore the question which presents itself is: "Is the appellant, under the allegations of its Second Amended Bill, entitled to the relief prayed for?"

"Apellee by its demurrer admits the truth of the allegations of fact in the bill, so far as the same are well pleaded."

1 Foster's Fed. Practice, Sec. 108;

1 Bates' Fed. Equity Procedure, Sec. 178.

Appellee in this cause by its demurrer admits that the appellant is a railroad corporation duly and regularly organized as such for the purpose of constructing a line down the north bank of the Columbia River, and that it has complied with the act of March 3, 1875, and the rules and regulations of the Secretary of the Interior, and that it has secured and owns the right of way over the public lands referred to and described in said bill; it admits that the appellant has caused the central line of its railroad to be definitely surveyed and located on the ground over said land, and that the said central line of route was marked upon the ground by stakes such as are usually employed by surveyors of railroad lines, and that the appellant is in the actual possession of that portion of the right of way described in paragraph XIII of the said bill, and that it was at the beginning of this suit, is now and has been for some time prior thereto actually and actively engaged in the building and construction of a grade for its railroad thereover and thereon, and is now expending and has heretofore expended large sums of money in and for said construction, and has completed its grade upon a portion of its said right of way. It admits that the appellee on or about the 29th of December, 1905, through its officers, agents and employes, wrongfully and without authority of law, or the consent of the appellant, entered upon the right of way described in said amended bill, and that at the time it entered upon the same it knew that the appellant owned said right of way; that its maps of location had been filed and approved by the Secretary of the Interior, and that it had actual knowledge that the location of appellant's railroad was plainly and distinctly

marked upon the ground. It admits that it located its line of railroad upon appellant's right of way, and that it could have located its line in many places so as not to have materially affected or in any manner interfered with or injured appellant's right of way, but that appellee by deliberate act and design and intent so located its line that the same would not only conflict with appellant's location, but would prevent the use of the right of way so acquired by the appellant, by making it physically and financially impossible for appellant to construct a railroad upon its right of way. It admits that it made its attempted location and made it so that no other railroad could be located, constructed and operated in Skamania County, Washington, on the north bank of the Columbia River, except at a cost which would be prohibitory. It admits that the line of railroad located by appellant permits the construction of another line of railroad on the north bank of the Columbia River, and admits that the construction of a railroad on appellee's attempted location will prevent the building of another railroad on the north bank of the Columbia River. It admits that it is now wrongfully and without authority constructing a railroad grade on its said attempted location, and that it has placed on appellant's right of way its teams and apparatus and is engaged in excavating the ground thereon, and making fills, cuts and embankments, with intent to construct and operate a line of railway over said attempted location, and admits that it intends and declares that it will continue the said work of constructing its said railway on appellant's right of way from its beginning point to its ending point. It admits that it threatens and intends

and will, unless restrained, enter upon the right of way of appellant through its entire line for the purpose of constructing a railroad thereon, and for the further purpose of preventing appellant from constructing and operating a railway upon appellant's conceded right of way. It admits that its curves differ from appellant's curves, and that the height of its grade differs from the height of appellant's grade, and that the construction by appellee of its grade will greatly add to the expense of constructing a grade by appellee on its located line, and will in many places prevent the appellant from constructing, except at an expense which would be absolutely prohibitory. It admits that it is borrowing large quantities of material from appellant's right of way, using and threatening to use the material in the construction of its grade. It admits that said action and the use of said material will materially add to the expense of constructing appellant's grade, and in many places will cause an expense so great as to make the construction of a grade by appellant prohibitory. It admits that the work which it has already done will increase the expense of the construction of a railroad by appellant to a large amount of money.

Appellee also admits that unless restrained it intends and threatens to enter in and upon that portion of the right of way which is now in the possession of the appellant, and upon which appellant is engaged in constructing its grade for its railroad, and that appellee intends to enter upon the land and destroy and injure the said constructed grade of appellant, and prevent the appellant from building and constructing its grade thereon, to appellant's irreparable injury and damage. It admits

that it is continually trespassing and threatening trespass upon said right of way of appellant, and admits that unless restrained and enjoined it will continue its said trespasses and threatened trespass stated in said bill. It admits that appellant will be required to bring a multiplicity of suits against the appellee, its agents and employes, to prevent further injury, and admits that the appellant's injury cannot be compensated in damages, and the affidavits supporting the allegations of the bill are not denied.

In view of the foregoing facts it is apparent that the Court erred in sustaining the demurrer, denying the appellant the relief sought for, and in dismissing the suit.

"It is unquestionably settled that equity has jurisdiction by injunction to prevent the interference with easements or their disturbance or destruction, actual or threatened. This doctrine has been applied in a great variety of cases, such as preventing the diversion of water, preventing the obstruction of a private right of way, preventing the pollution of a stream, preventing the obstruction of a public right of way, etc., and in the prevention of obstructions or interferance with a railroad's right of way. Every disturbance of an easement, actual or threatened, will be restrained whenever, from the essential nature of the injury or from its continuous character, the legal remedy is inadequate. It is shown by the bill that the defendants are denying the right of the complainant to the right of way, and are insisting upon their right to cultivate the lands up to the ends of the cross-ties of the complainant's roadbed and track, and are denying the complainant the right to go upon the lands included in its right of way for the purpose of reconstructing its roadbed

and banks and cutting or repairing ditches therein as the same are needed in the proper maintenance and operation of the road."

Louisville & N. R. Co. v. Smith, 128 Fed 1.

"Courts of equity have always been open to suitors seeking preventive relief against wrongdoers who persist in committing trespasses of the kind which do permanently impair the value of real estate, whether the injury consists in the removal of minerals from mining lands, cutting down trees, digging the soil, or other kinds of mischief."

N. P. Ry. Co. v. Cunningham, 103 Fed. 708;

Am. Mill & Mining Co. v. Warren et al., 82 Fed. 522;

Pomeroy's Equit. Remedies, Secs. 493, 494, 495, 496 and 505;

Burlington v. Schwarzmer, 52 Conn. 181-4;

Stanford v. Stanford Horse R. Co., 56 Conn. 381, 393.

N. Y. & N. H. & Hart. R. R. v. Scoville, 71 Conn. 136-148.

The Circuit Court of Appeals, for the eighth circuit, makes the following observation:

"It is insisted on behalf of the appellees that the bill is insufficient, because it fails to show their insolvency, or irreparable injury to the appellant. It discloses a continuing trespass, however, upon the lands of the Freehold Company, by twenty-eight persons, and constant and wrongful diversion of water through those lands, which is continually depreciating their value. These facts, if

established—and they are admitted here—are certainly sufficient, on well-settled principles, to entitle the complainant to the relief it seeks. A continuing trespass upon real estate, or upon an interest therein, to the serious damage of the complainant, warrants an injunction to restrain it. A suit in equity is generally the only adequate remedy for trespasses continually repeated, because constantly recurring actions for damages would be more vexatious and expensive than effective."

U. S. Freehold Land & Emigration Co. v. Gallegos, 89 Fed. 769;

King v. Stewart et al., 84 Fed. 546;

Erwin v. Fulk Auditor et al., 94 Ind. 235.

The Supreme Court of Illinois in the case of Edwards v. Haeger, 180 Ill. 99-108, says:

"It is urged an injunction will not be granted to restrain a trespass. This is the rule as to a single act of simple trespass to property, but where a trespass has been committed and repetitions thereof are threatened, and the injury which follows such trespass is irreparable in damages, equity will interfere by injunction."

Birmingham Traction Co. v. Sou. Bell Tel. & Tel. Co., 119 Ala. 144.

A court of equity will grant an injunction restraining trespass, even though the title of the property may be in dispute.

Cheesman et al. v. Shreve et al., 37 Fed. 36;

Wilson et al. v. Rockwell et al., 29 Fed. 674.

The appellee had no right to take the law in its own hands and attempt to enter into the possession of prop-

erty which it knows to be claimed by another. Titles to property are not determined in this day and age by force, and in this respect the remarks of Judge McCrary in the case of

Wn. Union Tel. Co. v. St. Joseph & Wn. Ry. Co., 3 Fed. 430,

are very much in point as applied to the facts in this case. We quote from page 434:

"What I wish to emphasize in this case, as well as in other similar cases, is that the defendants have no right to take their remedy into their own hands. If they have the right to seize this property by force, upon the ground that they hold the contract void, according to the same reasoning the plaintiff would have the right to adjudge the contract valid, and by force retake the property. In other words, force and violence would take the place of law, and mobs would be substituted for the process of courts of justice. The strongest litigant, the one commanding the largest force of men and the most money, would succeed. Such a doctrine, if recognized by the courts as a proper mode of adjusting disputes concerning property rights, would lead at once to anarchy."

The appellant is not only entitled to an injunction restraining the appellee from trespassing upon the property in the possession of appellant and upon which it was building its railroad, but is also entitled to an injunction restraining the appellee from remaining upon that portion of the right of way which it had by force taken, and upon which it was attempting to construct its railroad line, to the destruction of the appellant's estate.

"If the possession of the defendant is a mere interrup-

tion of the prior possession of the plaintiff, the interruption will be remedied by injunction if the right is clear and certain without driving the plaintiff to establish his title by law."

16 Am. & Eng. Ency. of Law, 2d Ed., page 365.

It is admitted by the demurrer that appellant has secured the title to the right of way in question from the Government. It is likewise admitted that the appellant has located its line of railroad thereon by distinctly marking the same upon the ground, and was therefore in possession of the same. The facts show that the appellant's possession was simply interrupted by force exercised by appellee, and that therefore the appellant is entitled to the actual possession of the property, and the appellee should be restrained from entering thereon.

The case of

In re Conway, 4 Arkansas 302,

on this point is instructive, and we quote from page 344:

"It is true that the general principle is that the court will not by preliminary injunction change the possession of property and transfer it to complainant. But this is a rule to which there are and must be exceptions. If the possession of the defendant is a mere interruption of the prior possession of the plaintiff, that interruption will be removed by injunction, if the right is clear and certain without driving the plaintiff to establish his title at law."

, And we call attention also to the case of

Pokegama Sugar Pine Lbr. Co. v. Klamath River Lbr. & Imp. Co., 86 Fed. 528,

in which case Judge Morrow issued an injunction restraining acts of trespass, and also had occasion to determine

the right of the court of equity to, by injunction, take possession of property away from one who wrongfully obtained the same. We take the following quotation from page 533:

"It is contended that the injunction, although preventive in form, was mandatory in effect, its execution resulting in a change in the status of the parties. This contention assumes that the court will recognize the respondent as asserting, at the time the bill was filed, a claim of possession to the property under a color of right to such possession, and that the effect of the order was to oust it from that possession. But equity will not permit a mere form to conceal the real position and substantial rights of parties. Equity always attempts to get at the substance of things, and to ascertain, uphold and enforce rights and duties which spring from the real relations of parties. It will never suffer the mere appearance and external form to conceal the true purposes, objects and consequences of a transaction."

And again on page 534, the learned Judge further says:

"In other words, the respondent assumed to determine for itself that a forfeiture of the lease had been incurred; that it had thereby succeeded to large and valuable interests and improvements placed upon the property by the lessee and his assigns; and that it had by reason of such forfeiture acquired the right to re-enter, drive away the employes of the complainant, and maintain possession of the property by force and arms. A court of equity will not fail to see in such a possession a mere form to hide from view the unlawful character of the proceedings by

which the possession was gained, and, whatever may be the substantial rights of the parties in their true relation under the contract, the court will not give its sanction to such proceedings."

Under the foregoing authorities the appellant is entitled to the full measure of the relief it seeks, and therefore the judgment dismissing this cause should be reversed and the lower court directed to overrule the demurrer to the appellant's Amended Bill of Complaint, and to issue the injunction prayed for.

Respectfully submitted,

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No. 1500

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

COLUMBIA VALLEY RAILROAD COMPANY,
Appellant,

vs.

PORTLAND AND SEATTLE RAILWAY COMPANY,
Appellee.

Appellee's Brief.

Appeal from Circuit Court for Western District of Washington.

CHARLES H. CAREY and
JAMES B. KERR,
Counsel for Appellee.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

COLUMBIA VALLEY RAILROAD COMPANY,
Appellant,

vs.

PORTLAND AND SEATTLE RAILWAY COMPANY,
Appellee.

Appellee's Brief.

STATEMENT.

This is an appeal by the Columbia Valley Railroad Company from a decree of the circuit court of the United States, for the western district of Washington, dismissing the bill brought by the appellant against the Portland and Seattle Railway Company.

The history of the litigation in the circuit court is that on February 2, 1906, the complainant filed its bill in the circuit court, and thereafter and on February 23, 1906, a demurrer to the bill was sustained (Trans. p. 1,

p. 26). Thereupon and on March 28, 1906, the complainant filed an amended bill of complaint (Trans. p. 27), and on September 8, 1906, a demurrer was sustained to the amended bill (Trans. p. 94). The complainant then filed a second amended bill of complaint (Trans. p. 95), and on November 14, 1906, an order was entered striking from the files the second amended bill, for the reason that it was filed without leave of court (Trans. p. 143). The court then, on application, granted leave to refile the second amended bill (Trans. p. 144), but on the same day the demurrer of the defendant to the second amended bill was sustained (Trans. p. 148). A decree dismissing the cause was entered February 11, 1907 (Trans. p. 149).

The original bill alleged that the complainant was a railroad corporation organized and existing under the laws of the state of Washington, and that the defendant was a railroad corporation organized under the laws of the same state; that the complainant claimed a right of way over certain public lands of the United States under the provisions of the act of congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States." The provisions of this act are set out at length, and the bill alleges in detail the performance by the complainant of the things required by the act to acquire a right of way, namely, the filing of a certified copy of its articles of incorporation with the secretary of the interior, the making of a survey, preparation of maps showing the surveyed line of the pro-

posed road of complainant, and the approval by the secretary of the interior of the proofs and maps so filed in the year 1899.

The bill alleges that at the various times therein mentioned, certain lands described by government subdivisions were public lands of the United States, and that by virtue of the matters set forth in the bill the complainant became the owner of a right of way 200 feet wide over and across such subdivisions. It is alleged that in the year 1905 the defendant, without the consent of the complainant, entered upon certain of the premises described in the bill, and under a pretense of ownership undertook to construct thereon a railroad. The bill prayed that the defendant be enjoined from occupying the premises and from constructing its railway thereon.

The demurrer which was sustained to this original bill specified that the bill did not state facts which entitled the complainant to relief, and that the court was without jurisdiction of the cause.

The second amended bill of complaint (Trans. p. 27) is substantially identical with the original bill, except that it undertakes to set forth at length by specific averments the title under which the defendant claims the right to enter upon the premises. For example: It alleges that as to one tract the defendant claims that one Heinrich Kapp claims to have acquired title to a government subdivision under the act of congress of June 3, 1878, commonly called the timber and stone act, but after the compliance by the complainant with the

act of March 3, 1875, and has undertaken to convey to the defendant a right of way across said premises: that as to other tracts, the defendant claims that the Northern Pacific Railway Company as successor of the Northern Pacific Railroad Company, selected the land under a certain act of congress of July 1, 1898, and has attempted to convey to the defendant a right of way across such premises. The amended bill concludes with the same prayer as the original bill.

Although the circuit court sustained a demurrer to the original bill, upon the ground that it presented no case within the jurisdiction of the circuit court, nevertheless the memorandum opinion, filed in support of the decision sustaining the demurrer to the amended bill, holds that a case was presented involving a federal question, but the demurrer was sustained upon the ground that the complainant had an adequate remedy at law.

After the demurrer was sustained to the amended bill of complaint, the second amended bill of complaint was filed as above stated. This bill was identical with the first amended bill, except in this, that the second amended bill contained an allegation that the "complainant was at the time of the institution of the suit and is now in the actual possession of a right of way over a portion of the land described in the bill, and is and has been for some time prior hereto, actually and actively engaged in the building and construction of a grade for its railroad thereon."

The demurrer to this bill was sustained without the filing of an opinion.

ARGUMENT.

The first inquiry is whether such a case was made by either of the bills as presented a cause within the jurisdiction of the circuit court. Considering first the original bill, it is clear that no claim of jurisdiction can be made except upon the ground that the bill presents a case requiring the construction of the constitution, laws or treaties of the United States, for the reason that it appears upon the face of the bill that both the complainant and the defendant are Washington corporations and, therefore, diversity of citizenship does not exist. It is obvious that the circuit court was right in sustaining the demurrer to the original bill, because it did not appear from its averments that a decision of the controversy which was presented required a construction of an act of congress. It was argued in the court below, and will be argued here, that the fact that the bill deraigned title to the land in controversy under the right of way act of March 3, 1875, is sufficient to present a federal question, but the authorities do not sustain this view, and the circuit court was clearly right in sustaining the demurrer to the bill as originally drawn. The allegations of this bill in effect are that the complainant claims to be the owner of a strip of land 200 feet in width by virtue of having complied with the act of March 3, 1875. The fact that title is deraigned under an act of congress, however, by no means presents a case which necessarily requires a construction of such act. Notwithstanding the averments of the bill, it might well appear upon the trial of the

cause that the defendant (a) denied the allegation that at the time of the survey by the complainant the lands in controversy were public lands of the United States, or (b) that the defendant held a deed of conveyance from the complainant of the right of way in question, or (c) that the defendant was admittedly a naked trespasser. If any of these facts appeared upon the hearing, no construction of the act of March 3, 1875, would have been involved and the court would have had no occasion to construe an act of congress. The authorities fully sustain the circuit court in its action in sustaining the demurrer to the original bill.

In Third Street etc., Railway Company vs. Lewis, 173 U. S. 457, the court said:

> "It is thoroughly settled that under the act of August 13, 1888, the circuit court of the United States has no jurisdiction, either original or by removal from a state court, of a suit as one arising under the constitution, laws or treaties of the United States, unless that appears by the statement of the plaintiff to be a necessary part of his claim."

In Blackburn vs. Portland Gold Mining Company, 175 U. S. 571, the facts were as follows:

Blackburn, a citizen of Colorado, brought the action in the circuit court of the United States for the district of Colorado against the Portland Gold Mining Company, an Iowa corporation, and one Stratton, a citizen of Colorado. Blackburn and Stratton being

both citizens of Colorado, the jurisdiction could only be sustained if the case made by the complaint required a construction of the laws of the United States.

The suit was brought under sections 2325 and 2326 revised statutes of the United States, authorizing a suit to determine adverse claims to mining claims.

The complaint alleged that Stratton had applied for a patent on a certain mining claim, and that the plaintiff Blackburn had filed his adverse claim and protest against the allowance of Stratton's application upon the ground that he, Blackburn, was the owner of the claim so applied for. The complaint alleged that Stratton had sold his interest to the Portland Gold Mining Company, and for that reason it was made a party.

The court held that no federal question was presented and dismissed the case for want of jurisdiction. This conclusion was reached largely upon the authority of Little New York Gold Washing and Water Co. vs. Keyes, 96 U. S. 199, from which the court quoted as follows:

> "In this petition the defendants set forth their ownership, by title derived under the laws of the United States, of certain valuable mines that can only be worked by the hydraulic process, which necessarily requires the use of the channels of the river and its tributaries in the manner complained of; and they allege that they claim the right to this use under the provisions of certain specified acts of congress. They also allege that the action arises under, and that its

determination will necessarily involve and require the construction of, the laws of the United States specifically enumerated, as well as the pre-emption laws. They state no facts to show the right they claim, or to enable the court to see whether it necessarily depends upon the construction of the statutes. * * * The statutes referred to contain many provisions; but the particular provision relied on is nowhere indicated. A cause cannot be removed from a state court simply because, in the progress of the litigation, it may become necessary to give a construction to the constitution or laws of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the constitution or laws upon the facts involved. Before, therefore, a circuit court can be required to retain a cause under this jurisdiction, it must in some form appear upon the record, by a statement of facts 'in legal and logical form', such as is required in good pleading. * * * that the suit is one which 'really and substantially involves a dispute or controversy' as to a right which depends upon the construction or effect of the constitution, or some law or treaty of the United States."

See also

Shoshone Mining Company vs. Rutter, 177 U. S. 505.

Joy vs. St. Louis, 201 U. S. 332.

If the contention of the complainant is correct, that it was the owner of the strip of land described in the bill, the only allegation necessary to admit the proof essential to the establishment of its claim was an averment that it was the owner of the premises in controversy. It is only where an equitable title is involved that it is necessary to plead at length the facts upon which the title rests, but where a legal title is involved, it is sufficient for the complainant to allege that it is the owner, and this will permit proof of any facts which are sufficient to create a legal title. If an individual holds a patent acquired through a compliance with the homestead law, it is unnecessary to allege the performance of all the steps culminating in the issuance of the patent, for the law is satisfied with the simple allegation that the plaintiff is the owner.

As stated above, the only respect in which the first amended bill differs from the original bill is in the allegations deraigning the supposed claim of title of the defendants, but it has been settled beyond controversy by the supreme court that if a statement of the complainant's title does not present a federal question so as to confer jurisdiction upon the circuit court of the case as one involving a construction of an act of congress, the jurisdiction cannot be aided by any allegations as to the claims of the defendant.

In Boston and Montana etc. Milling Company vs. Montana Ore Purchasing Company, 188 U. S. 639, the facts were as follows: The complainant filed its bill in the circuit court of the United States for the district of Montana, alleging that it was the owner of certain mining grant called the Penn. Lode mining claim, lot No. 172, and that its title was derived from a mineral patent issued by the United States, April 9th, 1886. The bill then averred that on April 1st, 1895, the defendants wrongfully entered upon complainant's premises, and from that time on extracted from the mine large quantities of valuable ores, and that they continued to extract and mine ores and threatened to so continue unless enjoined.

For the purpose, as the bill alleged, of showing the jurisdiction of the circuit court, it was further averred that the defendants owned certain properties called the Rarus Lode Claim, No. 179, and the Johnstown Lode Claim, lot 173, and the Little Ida Lode Claim, lot 126, which claims adjoined the lode claims of complainant. The bill further averred that various claims which were and would be made by defendants as to their rights in complainant's mine by reason of their ownership of the other mines above mentioned were without foundation, yet they would be urged as a defense to the bill, and the claims of the defendants were denied and disputed, as were also the facts upon which the defendants based their defense. The bill alleged that defendants claimed that the complainant could not obtain relief for the ores abstracted within that portion

of the premises owned by it without first showing that the apices of the veins from which the ores were extracted were within the surface lines of the ground owned by complainant, whereas complainant claimed that *prima facie* it was the owner of all ores found within its boundaries extended downward into the earth until it was shown that some other person had some right thereto by reason of ownership of the apex of the vein within some other claim.

The bill further alleged that because of these disputes between the parties, the controversy required the construction of the statutes and mining regulations of the United States and, therefore, presented a federal question.

The defendants answered the bill and denied, for the purposes of the case in question, that it made or intended to make the claims set out in the bill.

Upon this record, the supreme court held that no controversy was presented arising under the laws of the United States. The court held that the averments in the bill as to the claims of defendants were unnecessary to a statement of the complainant's cause of action, and that being unnecessary, they must be rejected as surplusage, and that the complainant could not be permitted to create a controversy within the jurisdiction of the circuit court by anticipating the defendant's defenses.

The complainant urged upon the argument that the allegations as to the claim of title of defendant were properly included in the bill, because it was a bill to

quiet title and a statement of the nature of defendant's claim being essential in a bill to quiet title, the allegations were properly included. The court held, however, that the bill was one merely to enjoin trespass and not to quiet title, and that the statement of defendant's claim had no place in the bill.

In the decision by this court in Montana Ore Purchasing Company vs. Boston and Montana etc. Mining Company, 93 Fed. Rep. 274, 279 (affirmed by the decision of the supreme court above referred to), the language of Judge Caldwell in City of Fergus Falls vs. Fergus Falls Water Company, 72 Federal Rep. 873, following the doctrine of Tennessee vs. Union Planters Bank, is quoted:

> "The averments of the complaint beyond those which state a cause of action upon the contract in suit are mere surplusage. When the statement of the plaintiff's cause of action in legal and logical form, such as is required by the rules of good pleading, does not disclose that the suit is one arising under the constitution or laws of the United States, then the suit is not one arising under that constitution or those laws and the circuit court has no jurisdiction."

All the considerations above suggested apply with equal force to the second amended bill, and it is submitted that no case is made by this bill when tested by the rules laid down by the supreme court as one involving the construction of an act of congress so as to be within the jurisdiction of the circuit court.

But if there be any doubt in this regard, it is clear that no case was presented by the second amended bill for an injunction against the defendant. The demurrer was properly sustained upon the merits.

The suit was commenced February 2, 1906, and the second amended bill was filed November 14, 1906. The act of March 3, 1875, by section 4, provides that if any section of a road located under the provisions of the act shall not be completed within five years after the location of such section "the rights herein granted shall be forfeited as to any such uncompleted section of said road." It appears, therefore, that more than five years had elapsed between the location of the Columbia Valley Railroad Company, which took place in 1899 according to the averment of the bill, and the time of the commencement of the suit. It may be conceded however, for the purposes of this case, that if the act of March 3, 1875, vests the fee to a strip of land 200 feet wide in a railroad company as the grantee and beneficiary under that act, the provision above quoted is in the nature of a condition subsequent, and the title to such strip will not revest without legislative action by congress sufficient to indicate an intention to take advantage of the breach of the condition and thereby enforce the forfeiture. It may be observed, however, in passing, that if the act of March 3, 1875, only operates to grant an easement or a right to acquire a right of way by construction, it may well be held that the lapse of time, without congressional action, is sufficient to extinguish the right.

See

Alling vs. Railway Company, 99 U. S. 463.

Smith vs. Townsend, 148 U. S. 490.

Pensacola etc. Rd. Co., 19 Land Dec. 386.

Brucker vs. Buschmann, 21 Land Dec. 114.

But it appears that after the commencement of the suit, and before the filing of the second amended bill, congress did enforce the forfeiture by the passage of an act approved June 26, 1906, entitled "An act to declare and enforce the forfeiture provided by section four of the act of congress approved March third, eighteen hundred and seventy-five, entitled 'An act granting to railroads the right of way through the public lands of the United States.'"

This act is as follows:

"Be it enacted by the senate and house of representatives of the United States of America in congress assembled: That each and every grant of right of way and station grounds heretofore made to any railroad corporation under the act of congress approved March third, eighteen hundred and seventy-five, entitled 'An act granting to railroads the right of way through the public lands of the United States,' where such railroad has not been constructed and the period of five years next following the location of said road, or any section thereof, has now expired, shall be, and hereby is, declared forfeited to the United States, to the extent

of any portion of such located line now remaining unconstructed, and the United States hereby resumes the full title to the lands covered thereby freed and discharged from such easement, and the forfeiture hereby declared shall, without need of further assurance or conveyance, inure to the benefit of any owner or owners of land heretofore conveyed by the United States subject to any such grant of right of way or station grounds; *provided*, that in any case under this act where construction of the railroad is progressing *in good faith* at the date of the approval of this act, the forfeiture declared in this act shall not take effect as to such line of railroad."

Although this act above quoted was passed *pendente lite*, it must be read as part of the act under which the complainant claims title to the premises in question, and unless the bill contains sufficient averments to show a title in the complainant, notwithstanding the provisions of the act as amended, it must be held to show no ground for relief. This is well illustrated by the decision of the supreme court in United States vs. Winona and St. Peter Railway Company, 165 U. S. 463-476. That was a suit in equity brought by the United States to recover lands alleged to have been erroneously certified to the state of Minnesota for the benefit of the defendant railroad company, and by it sold to various purchasers. After the decree in the circuit court, congress passed the act of

March 2, 1896, confirming the titles of bona fide purchasers, defining them, as held by the supreme court, as persons who purchased without actual notice of defects in their title. The supreme court, in considering the case on appeal from a decree setting aside the certification, held that the rights of the parties must be measured by the law as it existed when the appeal was heard, and that inasmuch as congress had confirmed the titles of the defendant purchasers, although after the institution of the suit, the decree cancelling the titles must be reversed and the intention of congress given effect even as to the pending litigation. It results, therefore, that in the present case unless the second amended bill contains sufficient averments to protect the complainant against the forfeiture declared by the act of June 26, 1906, it is bad upon demurrer. It will be observed that congress declared a forfeiture as to all such titles as those claimed by the complainant save and except in those cases where it appeared that on June 26, 1906, the grantee under the act of March 3, 1875, which had allowed more than five years to elapse after the location of its line, was engaged in the construction of its railroad in good faith. The only allegation in the second amended bill with reference to the construction of the complainant's road is that the complainant "is now (November 14, 1906) and has been for some time prior hereto, actually and actively engaged in the building and construction of a grade for its railroad therefor and thereon."

It therefore appears that the second amended bill

fails to state any fact which relieves the complainant from the operation of the forfeiture declared by the act of June 26, 1906, and it therefore has no title to the premises in question.

Some point is attempted to be made by the complainant that the enforcement of a forfeiture cannot be made by act of congress, but only by judicial proceeding authorized by act of congress.

The argument of the appellant is, if we rightly understand it, that because the practice usually resorted to at common law by the sovereign of England was of instituting a direct proceeding involving an inquiry by a jury, such a proceeding and a jury trial are essential to a resumption of title by the United States. But in this country it has been settled by the decisions of the supreme court of the United States for forty years that the legislative declaration of a forfeiture by the United States is the equivalent of an entry by an individual and has the effect to determine and revest in the United States an estate granted upon condition subsequent where the condition has in fact been broken.

At common law, a private person who was grantor of an estate upon condition was required to make a formal entry upon the premises to enforce a forfeiture. This was upon the theory that it required as solemn an act to defeat an estate as to create it. 3 Washburn's Real Property, pp. 14-18 (Fifth Ed.).

After the entry, if the possession was still withheld, the grantor had his remedy by ejectment and on the

trial of such an action the question of the breach of the condition or, if broken, its waiver was a matter of fact to be determined by the jury. Hubbard vs. Hubbard, 97 Mass. 188, and cases cited at 3 Washburn's Real Property 18.

The conclusion is that at common law where an estate was granted by a private person upon condition subsequent and the condition was broken and the grantor elected to take advantage of the breach and made an entry, the estate revested, but the facts on which the forfeiture was claimed were subject to examination in an action of ejectment; where an estate was granted by the sovereign upon condition subsequent and the condition was broken and the sovereign elected to take advantage of the breach by causing to be instituted an inquest of office as an equivalent of an entry and the fact of forfeiture was found, the estate likewise revested, subject to the right of the grantee to have the question of fact re-examined in a proceeding instituted by him. Blackstone's Commentaries, Book 111, Chap. 17.

The enforcement of a forfeiture for breach of condition both in case of the individual and the sovereign depended upon the election of the grantor and only because of the difficulties of the sovereign employing the remedies open to the subject was a different procedure required in one case than in the other.

The law with respect to the enforcement of rights of private persons who claim under forfeitures of

conditions subsequent remains substantially the same but the nature of our government renders inapplicable the rules governing the enforcement of rights by the sovereign of England.

The title of the public lands of the United States can pass only by act of congress or by proceedings authorized by congress. Furthermore there is no authority vested in any person or officer to make an entry on behalf of the United States where a ground of forfeiture exists. The result is that the determination to take advantage of such a breach must in the nature of things be made by congress. And the cases so decide.

In Schulenburg vs. Harriman, 21 Wall. 44, the court said:

> "In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate, depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one, it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement. At

common law the sovereign could not make an entry in person, and, therefore, an office found was necessary to determine the estate; but, as said by this court in a late case (United States vs. Repentigny, 5 Wall. 286), 'the mode of ascertaining or of resuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly under the authority of the government without these preliminary proceedings.'"

In United States vs. Northern Pacific Railroad Company, 177 U. S. 435-440, the court said:

"In July, 1866, congress granted unto the California and Oregon Railroad Company a right of way over the public lands. In a subsequent suit between the railroad company and one Bybee, a holder of a mining claim, it was claimed that the railroad company had forfeited and lost its right under the grant by its failure to complete its road within the time limited in the act; that such failure operated *ipso facto* as a termination of all right to acquire any further interest in any lands not then patented. But it was held by this court, in the words of Mr. Justice Brown: 'That in all cases in which the question has been passed upon by this court, the failure to complete the road within the time limited is treated as a condition subsequent, not operating *ipso facto* as a revocation of the

grant, but as authorizing the government itself to take advantage of it and forfeit the grant by judicial proceedings, or by an act of congress, resuming title to the land.' "

In Atlantic & Pacific Railroad Company vs. Mingus, 165 U. S. 413, the facts were that a grant was made by act of congress of July 27, 1866, to the railroad company of certain odd numbered sections of land, upon condition that its railroad be constructed within a certain time. A portion of the road was constructed and a portion was not constructed, and on July 6, 1886, congress passed an act declaring all lands except the right of way, "adjacent to and coterminous with the uncompleted portions of the main line of said road, embraced within both the granted and indemnity limits as contemplated" by the act of organization, to be "forfeited and restored to the public domain." After the passage of this act, the railroad company brought the action which was ejectment against Mingus, who was occupying a portion of an odd numbered section opposite an unconstructed portion of the road. The original title of the plaintiff was conceded, and the only question presented by the case was as to the validity and effect of the forfeiture act. The court sustained the act of forfeiture and said (p. 434):

"But while we think the practice of forfeiting by legislative act is too well settled to be now disturbed, we do not wish to be understood as saying that this power may be arbitrarily exercised, or that the grantee may not set up in de-

fense any facts which he might lay before a jury in a judicial inquisition. It would comport neither with the dignity of the government, nor with the constitutional rights of the grantee, to hold that the government by an arbitrary act might divest the latter of his title when there had been no breach of the conditions subsequent, or when the government itself had been manifestly in default in the performance of its stipulations. The inquiry in each case is a judicial one, whether there has been, upon either side, a failure to perform, and it makes but little practical difference whether such inquiry precedes or follows the re-entry or act of forfeiture."

See also opinion by Judge Taft rendering decision of circuit court of appeals for the sixth circuit in Iron Mountain Railway Company vs. City of Memphis, 96 Fed. 113-127.

There can be no mistaking the language of these decisions. They mean that if a grant has been made by the United States upon condition subsequent and the condition has been broken, the title may be resumed by a declaration of congress to that effect.

The point is made that because no description of the rights of way declared forfeited by the act is given, except by reference to roads not constructed within five years next following the location, and because the act by its terms does not apply to cases where the construction of the railroad is progressing in good faith, ques-

tions of fact are involved which must be determined in a direct proceeding brought for that purpose. But every legislative forfeiture must in the nature of things either prescribe or presume a fact upon which its operation depends. This is well illustrated by Farnsworth vs. Minnesota & Pacific Railroad Company, 92 U. S. 47. In this case the state of Minnesota granted to the Minnesota and Pacific Railroad Company certain lands which had been granted to the state by congress, and provided the conditions upon which the grant should be earned, and that as to the lands pertaining to portions of the road which should not be constructed within a specified time they "should be forfeited to the state absolutely, and without further act or ceremony whatever." The company, although it built portions of the road and earned certain lands, made default with respect to other portions, and the state passed an act granting to another company the lands which were subject to forfeiture. The court held this second grant to be such a declaration of forfeiture as was sufficient to divest the title of the Minnesota and Pacific Company and confer it on the second grantee. It is plain that the right to forfeit depended on the question of fact whether the conditions of the grant had been fulfilled, and the extent of the forfeiture as applying to any particular tract of land depended on the question of fact whether it pertained to a constructed or unconstructed portion of the road. The court said at p. 66:

> "A forfeiture by the state of an interest in lands and connected franchises, granted for the

construction of a public work, may be declared for non-compliance with the conditions annexed to their grant, or to their possession, when the forfeiture is provided by statute, without judicial proceedings to ascertain and determine the failure of the grantee to perform the conditions. Such mode of ascertainment and determination —that is, by judicial proceedings—is attended with many conveniences and advantages over any other mode, as it establishes as matter of record, importing verity against the grantee, the facts upon which the forfeiture depends and thus avoids uncertainty in titles, and consequent litigation. But that mode is not essential to the divestiture of the interest where the grant is for the accomplishment of an object in which the public is concerned, and is made by a law which expressly provides for the forfeiture when that object is not accomplished. Where land and franchises are thus held, any public assertion by legislative act of the ownership of the state, after default of the grantee,—such as an act resuming control of them and appropriating them to particular uses, or granting them to others to carry out the original object,—will be equally effectual and operative. It was so decided in United States vs. Repentigny, 5 Wall. 211, and in Schulenberg vs. Harriman, 21 Wall. 44, with respect to real property held upon conditions subsequent."

The court said further (p. 67):

"The only inconvenience resulting from any mode, other than by judicial proceedings, is that the forfeiture is thus left open to legal contestation, when the property is claimed under it, as in this case, against the original holders."

See also Railroad Co. vs. Mingus, 165 U. S. 413.

The point is urged by the appellant that no one but the grantor or his heirs, if he be a natural person, or the successor, if the grantor be a corporation, can take advantage of a breach of condition, that is, cannot elect to make an entry or cause an estate granted upon condition to revest. The proposition so stated is, of course, elementary, but has no application whatever to the present case. The respondent is not seeking to forfeit the estate of the appellant. That has been done by act of congress, and the same act has confirmed the title of the appellee, which was previously burdened with appellant's easement. The language is "and the United States hereby resumes the full title to the lands covered thereby freed and discharged from such easement and the forfeiture hereby declared shall, without need of further assurance or conveyance, inure to the benefit of any owner or owners of lands heretofore conveyed by the United States subject to any such grant of right of way or station grounds."

The argument of appellant, if it should prevail, would not only defeat the plain purpose of congress under the present act, but would have such a far reach-

ing effect as to unsettle titles within the limits of the multitude of railroad land grants, which have been commonly supposed to be safely forfeited many years ago for failure to construct.

The general forfeiture act of September 29, 1890, (26 Stat. 496) purports in terms similar to those of the present act to forfeit and resume the title to all lands granted to any state or corporation "to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad *not now completed and in operation* for the construction or benefit of which such lands were granted."

Upon appellant's theory, until a judicial inquiry is had in a proceeding instituted by the United States for that purpose against each railroad company affected by this act, and the determination by a jury of both the questions of fact as to construction and as to operation, the title to the vast domain included in these forfeited grants remains in the grantees. No such suits have been brought by the United States, and by appellant's argument the vast areas so forfeited still belong to the defaulting railroad companies, and the people of the prosperous communities which have sprung up on these lands are naked trespassers.

It is submitted that the decree should be affirmed.

CHARLES H. CAREY and
JAMES B. KERR,
Counsel for Appellee.

No. 1500

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COLUMBIA VALLEY RAILROAD COMPANY, a Corporation

APPELLANT

v.

PORTLAND & SEATTLE RAILWAY COMPANY, a Corporation

APPELLEE

On Appeal from the Order and Judgment of the United States Circuit Court for the District of Washington

Reply Brief of Appellant

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Reply Brief of Appellant

Appellee questions the jurisdiction of the Circuit Court in this proceeding. It questioned it in the lower Court unsuccessfully.

It is true, as counsel for appellee states, that when this question was first suggested to Judge Hanford in this case, he held that the Circuit Court had no jurisdiction, but after the matter was fully presented to him and he gave the question consideration, he reversed his former holding and sustained the jurisdiction.

While some changes have taken place with reference to statutes regulating removals from State Courts to the Circuit Courts, the Circuit Courts have always had orig-

inal jurisdiction over cases involving federal questions, viz., cases arising under the constitution and laws of the United States, and therefore, no change in the statute on the subject of removals has modified or affected, to any extent whatsoever, the law applicable to the original jurisdiction of the Circuit Courts.

When does a case arise under the laws of the United States? This question has been answered many times by the Supreme Court of the United States, and in substantially the same language, and for the convenience of the Court, we will quote some of the statements by the Supreme Court defining such a case.

A case in law or equity consists of the right of the one party as well as the other, and may be truly said to arise under the constitution or laws of the United States whenever its correct decision depends upon the right construction of either.

Mayor v. Cooper, 6 Wall. 253;
Tenn. v. Davis, 100 U. S. 269.

The character of a case is determined by the questions involved.

Osborn v. Bank of U. S., 9 Wheat. 737-824;
Cohens v. Virginia, 6 Wheat. 264-379;
Mayor v. Cooper, *Supra;*
Gold Washing & Water Co. v. Keyes, 96 U. S. 199-201;
Tenn. v. Davis, *Supra;*
Railroad Co. v. Miss, 102 U. S. 135-140;
Ames v. Kansas, 111 U. S. 449-462;
Kansas Pac. v. Atchison R. R. Co., 112 U. S. 414-416;

Providence Sav. Co. v. Ford, 114 U. S. 635-641;
Pac. Railroad Removal Cases, 115 U. S. 1-11;
Starin v. New York, 115 U. S. 256.

"It has been frequently held by this Court that a case arises under the constitution and laws of the United States whenever the party plaintiff sets up a right to which he is entitled under such law, which the party defendant denies to him, and the correct decision of the case depends upon the construction of such law. As was said in Tenn. v. Davis, 100 U. S. 257-264: 'Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim, or protection, or defense of the party, in whole or in part, by whom they are asserted.' See also, Starin v. New York, 115 U. S. 248-257; Kansas Pac. R. R. v. Atchison, Topeka et al., R. R. Co., 112 U. S. 414; Ames v. Kansas, 111 U. S. 449-462; Railroad Co. v. Miss., 102 U. S. 135."

In re Lennon, 166 U. S. 553.

"Whether a suit is one that arises under the constitution or laws of the United States, is determined by the questions involved. If from them it appears that such title, right, privilege or remedy on which the recovery depends will be defeated by one construction of the constitution or laws of the United States, or sustained by the opposite construction, then the case is one arising under the constitution or laws of the United States. Osborne v. Bank of United States, 9 Wheat. 738; Starin v. New York, 115 U. S. 248-257."

Cooke v. Avery, 147 U. S. 384.

In cases where the original jurisdiction of the Circuit Court is involved, the jurisdiction is not defeated by the claim that the statute has been repeatedly construed by the United States Courts, and that therefore, the State Courts will undoubtedly properly construe the statute, for the reason that the plaintiff is entitled as a matter of right to have the proper construction placed upon the statute by the United States Court, and is not compelled to take any chances of an improper construction being placed upon it by any State Court. A federal question arises whenever a claim or right arises as the result of the application or effect of a statute, and such claim or right may be defeated by having an improper construction placed upon the statute. This principle is well stated in the following language in the case of Mayor v. Cooper, 6 Wall. 253:

"It is the right and duty of the National Government to have its constitution and laws interpreted and applied by its own judicial tribunal. In cases arising under them, properly brought before it, this Court is the final arbiter. The decisions of the Courts of the United States, within their spheres of action are as conclusive as the laws of Congress made in pursuance of the constitution; this is essential to the peace of the nation, and to the vigor and efficiency of the Government. A different principle would lead to the most mischievous consequences. The Courts of the several States might determine the same question in different ways."

This proposition, and also what is a federal question, are well illustrated in the case of Wiley v. St. Clair, 179 U. S. 58, and Swafford v. Templeton, 185 U. S. 487. In

both of these cases the plaintiff sought to recover damages on the ground that the State election officers had prevented the plaintiff from voting for members of the United States Congress. The qualification of voters, under the Constitution of the United States, are well known, and the opinion of the Court shows that the real question decided in each of the cases, was whether or not the plaintiff had complied with the State statute defining the qualifications of voters. There was no real dispute as to the terms of the constitution or the proper construction to be placed upon the constitution. Nevertheless the Supreme Court held that the plaintiffs' right to vote had its foundation in the constitution of the United States, and that having founded this right upon the constitution, the case was one arising under the constitution, and therefore, the Circuit Court had jurisdiction.

The opinion in Swafford v. Templeton, on page 494, also makes a distinction between cases based upon rights created by the constitution and laws of the United States, and which, the Court states are consequently in their essence federal, and controversies concerning rights not conferred by the constitution or laws of the United States, the contention concerning which may or may not involve a federal question depending upon what is the real issue to be decided. The distinctions thus made clearly show what all the cases have declared, viz., that whenever the right sought to be enforced by the plaintiff is one created by a law of the United States, then the case is, in its essence, federal, and the Circuit Court has undoubted jurisdiction.

Having thus attempted to show what is a federal question, the attention of the Court will now be called to this proposition, stated in the case of

Joy v. St. Louis, 201 U. S. 332,

cited by appellee, viz.:

"The mere fact that the title of the plaintiff comes from a patent, or under an act of Congress, does not show that a federal question arises."

The cases cited in support of this proposition: Blackburn v. Portland Gold Mining Co. 175 U. S. 571, and Shoshone Mining Co. v. Rutter, 177 U. S. 505, and De Lamar Nevada Co. v. Nesbitt, 177 U. S. 523.

Where a plaintiff sues on a patent from the United States the patent is conclusive as against all the world. There is no necessity, or occasion, therefore, of alleging any facts prior to the patent. The right is founded on the patent and not on any statute authorizing the issuance of the patent. If for any reason, however, the plaintiff finds it necessary to set forth facts prior to the issuance of the patent, and rests his right in part upon the statutes, then the case does present a federal question and is one which might have been commenced in the United States Court or might have been removed thereto. Of course, this rule is subject to the rule that good pleading require the plaintiff, in stating the real controversy and his real claim, to allege facts existing prior to the issuance of the patent.

An interesting case on this subject, and one directly in support of the proposition we are urging, is

Evans v. Durango Land and Coal Co., 80 Fed. 435.

In Blackburn v. Portland Gold Mining Company and other similar cases, commenced for the purpose of deter-

mining different claims to mining locations, the question presented was simply one as to the right of possession, and no right was founded by either of the parties upon any statute of the United States. These opinions clearly show that whenever any right is claimed under any particular statute, then a federal question exists and the Circuit Courts have jurisdiction. These questions are simply to the effect that a statute of the United States conferring jurisdiction upon a competent Court does not confer a right upon the plaintiff to commence his suit in the United States Court. Upon this point the Court says:

"Without undertaking to say that no cases can arise under this legislation which turn upon a disputed construction, and therefore presenting a question essentially federal in its nature, we hold that clearly where a patent is authorized to be issued to the party in possession, the statutes refer the contest to the ordinary tribunals, which are to determine the rights of the parties without any controversy as to the construction of those acts, but are to be guided by the laws, regulations and customs of the mining districts in which the lands are situated."

This point is again clearly presented in

De Lamar Gold Mining Company v. Nesbitt, 177 U. S. 528,

cited in the Joy case:

"There was undoubtedly a federal question raised in the case, but it was raised by the plaintiff Nesbitt, who based his right to recover upon the Acts of Congress of November 3, 1893, and July 18, 1894, suspending the forfeiture of mining claims for failure to do the required amount of work."

This case was one which came to the Supreme Court on appeal from a State Court, the defense taking the appeal. The Court clearly holds that if Nesbitt had seen fit to commence his action in the Circuit Court a federal question would have been presented and the Circuit Court would have had jurisdiction for the reason that Nesbitt based his right to recover, not on the local State regulations applicable to mining claims, and such possession acquired thereunder, but because of a right conferred upon Nesbitt as a result of a United States state statute.

What the Court means, and the proposition suggested in the Joy case, is further illustrated in the case of

McCune v. Essig, 199 U. S. 382.

In that case McCune made a homestead entry and died intestate, leaving as his only heirs the appellant, his daughter and his wife. The wife procured a patent to the land and conveyed the same to Essig, the appellee. The appellant commenced a suit in the State Court to establish title to the property. The appellee sought to remove the case to the Federal Court on the ground that the case was one arising under a statute of the United States, viz., the homestead laws. The appellant who commenced the suit resisted the removal and the jurisdiction of the Circuit Court was sustained. Note the following important facts:

That the case arose under the Land Laws of the United States, and patent had been issued; that the appellant commencing the suit pleaded no right under any statute of the United States, but on the contrary constantly contended throughout the whole case that the appellant inherited one-half of the property under the community

property laws of the State of Washington. The appellee sought to remove on the ground that in truth and fact the question must be determined by construction of the Homestead Laws of the United States.

Note further, that on page 389 of the opinion, the Supreme Court states that there is absolutely no doubt as to the proper construction to be placed upon the Homestead Laws, and it follows from this that there was no real controversy as to the construction to be placed upon such laws. The final result of the decision is that notwithstanding the fact that the appellant based her right on the Washington statute and always claimed that the United States statute had no application to her right, nevertheless the Supreme Court held that the cause was one arising under a statute of the United States, for the reason that such statutes covered the descent and therefore, the appellant's right to recover was in fact based upon a United States statute.

Note further, that there was absolutely no controversy as to the meaning of the United States statute, and that the whole controversy was as to whether or not the United States statute affected the title of appellant and governed and determined the rights of appellant.

This very lengthy case is a clear and positive holding to the effect that a case arises under the statutes of the United States whenever the plaintiff's rights depend upon such statutes, notwithstanding the fact that the plaintiff is insisting that the United States statutes have no application to the case. In other words, the case repeats the clear and positive declaration of the United States Court, repeatedly made, that a case arises under the laws of the

United States whenever a right, title or claim is asserted which depends upon the proper construction of the statute or the application of the statute to the facts presented. It is undoubtedly true, therefore, as stated in the Joy case, that:

"The mere fact that the title of plaintiff comes from a patent, or under an Act of Congress, does not show that a federal question arises."

But it is equally true that a title or right coming from a patent, or under an Act of Congress, does give rise to a federal question when such title or right depends upon a construction or application of an Act of Congress to the facts, and the decision in the Joy case is consistent with the previous ruling of the Court, for note the expression of the Court, at top of page 342:

"In those cases where the dispute necessarily appears in the course of properly alleging and proving the plaintiff's cause of action, the situation is entirely different."

The additional proposition asserted in the Joy case is that jurisdiction can not be conferred by the assertion in the plaintiff's pleading that the defense raises, or will raise a federal question.

This proposition we do not dispute. It is equally well established, however, that if a federal question arises as the result of logical and legal statement in the plaintiff's cause of action, such federal question cannot be eliminated by any concession on the part of defendant that there was no real and substantial controversy arising under the laws of the United States. In other words, the broad principle is that the original jurisdiction on the part of the Circuit Courts of the United States can not be made

to depend upon any defense which the defendant may or may not set up.

This principle was first stated in

Osborn v. U. S. Bank, 9 Wheat. 824,

and is repated in the following cases:

Pac. R. R. Removal Cases, 115 U. S. 23;

Tennessee v. Union & Planters' Bank, 152 U. S. 459.

In the latter case, page 459, the principle is stated in the following language:

"But 'the right of the plaintiff to sue cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend upon that state of things when the action is brought. The question which the case involves, then, must determine its character, whether those questions be made in the cause or not.' Osborn v. Bank of United States, 9 Wheat. 738, 819, 823, 824. In this last clause, as the context shows, the word 'then' (though printed between commas) means 'at that time,' that is to say 'when the action is brought.'"

In other words, the defendant can not, by conceding the correct construction of a statute, claim that a cause does not arise under the statute. The question is that shown by the quotation made in the earlier part of this brief, viz.: "Will the right claimed by the plaintiff be defeated by one construction of the United States statute or be sustained by another?"

This principle was directly applied in the case of

Cooke v. Avery, 147 U. S. 386.

In that case the plaintiff claimed one construction of the United States statute; the defendant at the first trial of the case insisted upon another, and at the second trial conceded that the plaintiff's construction was correct, and hence argued that there was no controversy arising under the laws of the United States. The Court disposed of the contention in the following language:

"It is now insisted by defendants that the latter is the true view, and hence it is said that there is no real and substantial controversy arising under the laws of the United States. Clearly, the right of a plaintiff to sue can not depend upon the defense which a defendant may choose to set up."

The same proposition is also set up by the case of McCune v. Essig, *Supra.* In that case the plaintiff insisted that the United States Homestead Act had no application to the plaintiff's case, but that the matter was governed by the law of descent of the State of Washington.

It furthermore appears from the statement of the Court, made on page 389, that there was and could be no dispute as to the meaning of a correct construction to be placed upon the Homestead Act. The defense sought and obtained a removal on the ground that in truth the facts alleged by the plaintiff showed that the plaintiff's right depended upon the construction of the Homestead Act.

It will be further noted that no reference was made in the plaintiff's complaint to the particular section which the Supreme Court afterwards held to be applicable to the facts. The Court held that the facts alleged showed that the plaintiff's rights depended upon the correct con-

struction of the Homestead Laws, and that therefore, the case was one arising under the Homestead Laws, notwithstanding plaintiff was insisting that such Homestead Laws had no application to the facts, and notwithstanding that there was no dispute as to the proper construction to be placed upon the Homestead Laws. The Supreme Court held that the Circuit Court had jurisdiction for the reason that the case was one arising under the laws of the United States. The result of these cases which we have examined in connection with the Joy case clearly establish the proposition that a federal question exists wherever the right or title claimed by the plaintiff may be defeated by one construction of a statute of the United States, or may be sustained by another, and that as long as such question properly appears by the pleadings of plaintiff, the federal question cannot be inserted by anticipating any defense of defendant and it can not be eliminated by any claim of plaintiff that the statute has no application to his right, or by any concession on the part of defendant that the statute applies but that there is no doubt about its construction and that the federal question exists, notwithstanding the fact that no real controversy exists as to the proper construction of the statute. Wherever the right of plaintiff depends upon a federal statute the plaintiff has the right to commence his suit in the Circuit Court for the purpose of obtaining a correct construction of the statute, or the defendant has a right to have the case removed to the Circuit Court for the purpose of obtaining a like construction. The sole and only question to be considered in every case is that the federal question must appear by a statement of facts made by the plaintiff, and

where such question does appear, then the Circuit Court has original jurisdiction.

Appellee refers to the case of

Gold Washing & Water Co. v. Keyes, 96 U. S. 199, a case frequently referred to and cited with approval in the Supreme Court in connection with cases similar to the one presented in this case. In fact reference to the Gold Washing case was made in the Joy case, the last utterance of the Supreme Court on this subject, and such reference is made upon the point as to what constituted good pleading in a case where a claim of right is made under a statute. By referring to page 202 and page 203 of the opinion in the Gold Washing case, it will be noted that the defendants claim a right to use the channel of a river under the provisions of a certain specified Act of Congress. Such allegations would be the equivalent of an allegation in the present case that the complainants were owners of rights of ways over public lands of the United States, under and by virtue of the Act of March 3d, 1875. To so plead is not to state facts but conclusions of law. Upon this subject the Court says, in the Gold Washing case, page 203:

"Certainly, an answer or plea, containing only the statements of the petition, would not be sufficient for the presentation of a defense to the action under the provisions of the statutes relied upon. The immunities of the statutes are, in effect, conclusions of law from the existence of particular facts. Protection is not afforded to all under all circumstances. In pleading the statute, therefore, the facts must be stated which call it into operation. The averment that it is in operation will not be enough; for

this is the precise question the Court is called upon to determine."

In the present case the complainant in pleading the statutes, stated the facts which call the statutes into operation. The complainant bases its right entirely upon the statute, and in its effort to plead the facts, bringing itself within the statute, the complainant shows that its location was made and its maps were filed and approved more than five years prior to the commencement of the suit, and it is upon these facts that the defendant denies the right of complainant and insists that the true construction of the Act of March 3d, 1875, applied to the facts so alleged, shows that the complainant's suit is without merit.

The question so presented is not a defense to the defendant, anticipated by the complainant, but it is a possible infirmity of the complainant's cause of action appearing as the necessary result of its statement of facts.

In addition, the allegation is made that the defendant claims a right in the lands to which the right of way of complainant attaches, and is disputing the right of complainant to build its railroad and that its rights are paramount to those of complainant; it has entered upon a portion of the right of way of complainant, is making excavations and fills thereon and is threatening to enter upon that portion of the right of way in possession of complainant and upon which complainant is now and has been constructing its railroad and threatens to destroy the grade so constructed and disputes the right of complainant to its right of way, on the ground that more than five years have elapsed since the location of complainant's right of way.

Under all the authorities, this Court has undoubted jurisdiction to decide the federal question on which the complainant's rights depend, viz., does the Act of March 3d, 1875, grant an estate prior to the construction which can only be divested by proper act on the part of the United States, or does such grant prior to construction simply make an offer which ceases without any act on the part of the United States, at the expiration of five years after location?

The complainant has no title by patent or any other written instrument executed by any officer of the United States Government, therefore, in order to claim the right of way the complainant must plead the statute and then must plead the facts to show that complainant has performed the acts necessary to bring it within the statute.

The Act of 1875 applies to public lands. In order to logically state the case the complainant must allege that the lands claimed were public lands and it must allege the facts which show that complainant has taken all the steps necessary, under the Acts of Congress, to obtain such right of way. As was said in the Gold Washing case:

"The office of pleading is to state facts, not conclusions of law. It is the duty of the Court to declare the conclusions, and of the parties to state the premises."

In this case complainant has no written grant, such as a patent from the United States, for the right of way claimed by it; it claims such right of way under an Act of Congress and by virtue of certain acts and things done by it in order to comply with such acts, and the proper pleading therefore, requires that all the acts and things

done by it in order to comply with the act shall be alleged as facts.

Complainant has undertaken to allege such facts, and its right, title and claim sought to be enforced in this suit, depend upon the construction placed upon the Act of Congress when applied to such facts. This is very easily seen by a comparison of the bill with the act itself, and we therefore insist that appellee's contention that the Circuit Court was originally without jurisdiction is without merit.

All of the contentions of appellee, as to the nature and character of the grant made by the Act of March 3d, 1875, are clearly disposed of by the following quotation from

Noble v. Union River Logging R. R., 147 U. S. 172,

wherein it is said:

"At the time the documents required by the Act of 1875 were laid before Mr. Vilas, then Secretary of the Interior, it became his duty to examine them, and to determine, among other things, whether the railroad authorized by the articles of incorporation was such an one as was contemplated by the Act of Congress. Upon being satisfied of this fact, and that all other requirements of the act had been observed, he was authorized to approve the profile of the road, and to cause such approval to be noted upon the plats in the land office for the district where such land was located. When this was done, the granting section of the act became operative, and vested in the railroad company a right of way through the public lands to the extent of 100 feet on each side of the central line of the road. Frasher v. O'Connor, 115 U. S. 102."

And the decision of the Supreme Court in the case of New Mexico v. United States Trust Co., 172 U. S. 171,

wherein the Court was determining whether a grant of a right of way under the act similar to the Act of 1875 was a grant in fee or a mere easement, in which case the Supreme Court held that such a grant was a grant in fee, it also makes the following observations, page 183:

"But if it may not be insisted that the fee was granted, surely more than an ordinary easement was granted, one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property."

Appelle now for the first time contends, that by virtue of the Act of June 26, 1906, which act is set out in full in appellee's brief, Congress has forfeited the right of way obtained by complainant, and while appellee admits that the original bill of complainant was filed February 2d, 1906, several months prior to the passage of the Act of June 26, 1906, and that the second amended bill was filed September 17th, 1906, that nevertheless the said Act of June 26th may be considered by the Court in this case, and appellee further insists, that even though the forfeiture act by its terms expressly provides:

"That in any case under this act where construction of a railroad is progressing in good faith at the date of the approval of the act, the forfeiture declared in this act shall not take effect as to such line of railroad," that the following allegations of complainant's second amended bill, "is now and has been for some time prior hereto, actually and actively engaged in the building and con-

struction of a grade for its railroad, therefore and thereon," is not an allegation that the complainant was on the date of approval of the Act of June 26, 1906, progressing in good faith in the construction of its railroad upon its said right of way.

In the first place, the Act of June 26, 1906, is not and can not be involved in this suit, as this suit was commenced some months prior to its enactment.

The case of

> United States v. Winona & St. Peter Ry. Co., 165 U. S. 463-476,

cited by appellee as supporting its contention that the said forfeiture act can now be considered in the decision of this case, is inapplicable and fails to support such contention as an examination of the decision will show. This case was one in which the Attorney-General of the United States, in obedience to a command of Congress, had instituted a suit in the name of the United States to cancel certain patents, and after the decision had been rendered by the Circuit Court and the Court of Appeals, and prior to the decision of the Supreme Court, Congress passed an act confirming the title to the property theretofore conveyed to the State. The Court, therefore, held that as Congress had directed the institution of the suit, it had a right, prior to the final decree, to direct the withdrawal. We quote a portion of the opinion, pages 476, 477:

"But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed. It is true this act was passed after the commencement of this suit—indeed,

after the decision of the Court of Appeals—but it is none the less an act to be considered. There can be no question of the power of Congress to terminate, by appropriate legislation, any suit brought to assert simply the rights of the Government. This suit was instituted by the Attorney General in obedience to the direct command of Congress, as expressed in the Act of 1887, and Congress could at any time prior to the final decree in this Court direct the withdrawal of such suit; and it accomplishes practically the same result when, by legislation within the unquestioned scope of its powers, it confirms in the defendants the title to the property which it was the purpose of the suit to recover. So, if this Act of 1896, taken by itself alone, or in conjunction with preceding legislation, operates to confirm the title apparently conveyed by the certification to the State for the benefit of the railroad company, that necessarily terminates this suit adversely to the Government, and compels an affirmance of the decisions of the lower courts without the necessity of any inquiry into the reasons advanced by those courts for their conclusions."

Complainant's title to the property is to be determined by the acts in force at the time of the commencement of its suit.

McCool v. Smith, 1 Black. 459-471.

The allegations of complainant's bill show that it was progressing in good faith on the 26th of June, 1906, in the construction of its railroad upon the said right of way, and that therefore the forfeiture act did not take effect as to complainant's line of railroad.

Complainant instituted this suit on February 2d, 1906 (Transcript page 23), and complainant alleges in paragraph 12 of its original bill:

"That all the steps taken as aforesaid by the plaintiff were taken in good faith for the purpose of constructing a railroad along the route described in its article of incorporation, and the plaintiff at all times since its incorporation has been and is now actively engaged in prosecuting the said enterprise, and desires and intends to construct with reasonable dispatch, and operate a railroad over said line described in its articles of incorporation, from a point near the mouth of the Columbia River, for the carriage of freight and passengers in accordance with its articles of incorporation, and is in all respects conforming to, and intends to conform to, the provisions of said Act of Congress, hereinbefore referred to, and the regulations of the said Secretary of the Interior relative to survey, location and construction of its said railroad." (Transcript, pp. 18 and 19.)

And again in its first amended complaint, complainant alleges in its 12th paragraph, as follows:

"That all the said steps taken as aforesaid by the plaintiff were taken in good faith for the purpose of constructing a railroad along the route described in its articles of incorporation, and the plaintiff at all time since its incorporation has been and now is actively engaged in prosecuting said enterprise, and desires and intends to construct with reasonable dispatch, and operate a railroad over said line described in its articles of incorporation, from a point opposite Wallula to a point near the mouth of the Columbia River for carriage of freight and passen-

gers in accordance with its articles of incorporation, and is in all respects conforming to and intends to conform to the provisions of the said Act of Congress hereinbefore referred to, and the regulations of the said Secretary of the Interior relative to survey, location and construction of its said railroad." (Transcript, page 45.)

And again complainant alleges, in its second amended bill, in its 12th and 13th paragraphs, as follows:

"And your orator further shows that all the said steps taken as aforesaid by your orator were taken in good faith for the purpose of constructing a railroad along the route described in its articles of incorporation, and your orator at all times since its incorporation has been and now is actively engaged in prosecuting the said enterprise, and desires and intends to construct with reasonable dispatch, and operate a railroad over said line described in its articles of incorporation, from a point opposite Wallula to a point near the mouth of the Columbia River for the carriage of freight and passengers in accordance with its articles of incorporation, and is in all respects conforming to and intends to conform to the provisions of the said Act of Congress hereinbefore referred to, and the regulations of the said Secretary of the Interior relative to survey, location and construction of its said railroad.

"And your orator further shows that it was at the time of the institution of this suit and it is now in actual possession of its right of way over the said public land hereinbefore described, as it traverses Lot 1, Section 35; Lots 1 and 2, Section 33, and Lots 2 and 3, in Section 32, all in Township 3, north of Range 9, east of the Willamette Meridian, and Lot 4, Section 35, Township 3, north of

Range 8, east of the Willamette Meridian, and is now and has been for some time prior hereto actually and actively engaged in the building and construction of a grade for its railroad therefor and thereon, and is now expending and has heretofore expended large sums of money in and for said construction, and has completed the grade upon some portion thereof." (Transcript, pp. 113 and 114.)

Therefore, admitting only for the purpose of argument, that the Court may consider in this case the Act of June 26, 1906, it appears from the allegation of the bill that complainant was engaged in the construction of its railroad and progressing in good faith at the date of approval of the act, and therefore, under the terms of the act forfeiture did not take effect as to complainant's line of railroad.

We state that this appears from the allegation of the bill, because the rule is general in all courts of equity that an original and amended bill are to be regarded simply as one entire bill, constituting in fact but one record. An amended bill is, in fact, a continuation of the original bill and forms a part of it, and the original and amended bills constitute but one pleading and but one record. And so far as the equity of the bill is involved the amended bill has relation to the commencement of the suit by the filing of the original bill. That such is the rule in equity appears beyond question by the following citations:

"An amended bill is in fact, a continuation of the original bill and forms a part of it, and the original and amended bills constitute but one pleading and but one

record; so much so that, when an original bill is fully answered and amendments are afterwards made to which defendant does not answer, the whole record may be taken *pro confesso* generally."

Bates on Federal Equity Procedure, Sec. 140.

"All amendments to the original bill are always considered as incorporated in it, and form a part of it."

Bates on Federal Equity, *Supra.*

"An amended bill is esteemed a part of the original bill and a continuation of the suit. But one record is made."

French, Trustee, v. Hay et al., 22 Wall. 238-246.

"The rule is general in all courts of equity, that an original and an amended bill are to be regarded simply as an entire bill, constituting in fact, but one record so far as the equity of the bill is involved. The amended bill has relation to the commencement of the suit by the filing of the original bill."

Adams v. Phillips, 75 Ala. 461;

Lipscomb v. McClellan, 72 Ala. 151.

"The amended bill becomes part and parcel of the original bill. The original bill and amended bill constitutes but one record. Amendments refer generally to the time of filing the original bill."

Corey v. Hillhouse, 5 Ga. 251;

Munch v. Shabel, 37 Mich. 166.

"That the amendment was properly allowed, was determined by this Court at a former term. And the allegations introduced by amendments are now to be taken as

part of the original bill and to have the same effect, in the ultimate determination of the cause, as if they had been originally inserted."

Hoyt et al., v. Smith et al., 28 Conn. 466-471.

"The reason of the rule is that amendments, when allowed, are always considered as incorporated in and as forming part of the original bill; the amendments in the original bill, constitute one record; the amendments, in contemplation of law, bear the same date as the original bill, and relate to facts which existed when the original bill was filed."

"Bates on Federal Equity Procedure, Sec. 150.

"An amendment therefore, speaks as of the date of the original bill; and an amendment alleging the requisite difference of citizenship in the present time is sufficient to establish the jurisdiction of the Court."

Foster's Federal Practice, Second Edition, Vol. 1, Sec. 164;

Birdsall v. Perego, 5 Blatchf. 251;

Fisher v. Moog, et al., 39 Fed. 665.

"Amendments to a bill have the same effect in the ultimate determination of the cause as if they had been originally inserted. When properly allowed they take effect as of the date of filing of the original bill."

Beech Modern Equity Practice, Vol 1, Sec. 154, 16 Cyc. 350;

Enc. of Pleading and Practice, Vol. 1, 491.

"An amended complaint speaks from the date of filing of the original complaint."

Kirkham et al. v. Moore, et al. (Ind.), 65 N. E. 1040;

Ferguson et al. v. Morrison et al. (Tex.), 81 S. W. 1240.

"For the purpose of determining the plaintiff's right of action, the complaint as amended is to receive the same consideration as if the matter alleged in the amended bill had been included in the bill when originally filed."

White v. Stevenson et al. (Cal.), 77 Pac. 828.

In view of the foregoing references, there can be no question but what the bill alleges a sufficient state of facts to show that the forfeiture act of June 26, 1906, does not apply to the complainant's line of road, and if the allegations contained in paragraphs 12 and 13 of complainant's second amended bill stood alone they are of themselves a sufficient allegation to show that complainant was engaged in good faith in the construction of its road at the date of the approval of the forfeiture act. And particularly is this so, as against a general demurrer where all intendments and presumptions exist in favor of the bill.

While appellant insists that the forfeiture act is not before the Court in this proceeding, and that if it is the allegations of the bill are such as to show that such act, under its terms, has no application to the complainant's line of railroad, we might add, however, that the act itself is not sufficient to declare and enforce a forfeiture. By the common law and the civil law the King can not take

upon himself the possession of an estate until judicially ascertained by a procedure in the nature inquest of office.

Chase's Blackstone, 750.

An inquest of office is the remedy in the United States applicable to cases where property is forfeited to the State.

People v. Folsom, 5 Cal. 377;
Reid v. Starr, 75 Ind. 252;
Wilbur v. Toby, 33 Mass. (16 Pick.) 177;
Jackson v. Adams, 7 Wend. 367 (N. Y.);
Crawford v. Commonwealth, 1 Watts (Pa.) 480;
Marshall v. Lovelace, Conf. R. (N. C.) 217.

And this rule has been recognized and adopted by the United States Supreme Court in cases involving the question of forfeiture of land to the Government.

Fairfax v. Hunter, 7 Cranch 603;
Smith v. Maryland, 6 Cranch 286.

"Before a forfeiture or reunion with the public domain could take place, a judicial inquiry should be instituted, or in the technical language of the common law, office found, or its legal equivalent. A legislative act directing the possession and acquirement of the land is equivalent to office found." U.S. v. Repentigny - 5 Wall. 211-267-8

It is true that the United States Supreme Court, upon several occasions held that the acts of Congress in the cases then before them, were sufficient and took the place of a suit, and were equivalent to a judicial proceeding. But in each of the cases, as an examination of them will show, the act was positive and free from doubt or ambig-

uity, left no facts to be ascertained; forfeiture was asserted and enforced unconditionally. The lands forfeited could be easily and at once identified by the acts, while under the Act of June 26, 1906, it is provided that the forfeiture shall only be enforced where a railroad has not been constructed within the five years following the location of the said road, or where the construction of the railroad was not progressing in good faith at the date of approval of the act, leaving two important questions to be decided before the forfeiture is to take effect.

"Legislation to be sufficient must manifest an intention by Congress itself to reassert title and resume possession. As it is to take the place of a suit by the United States to enforce a forfeiture, and a judgment therein establishing the right, it should be direct, positive and free from doubt or ambiguity."

St. Louis & Iron Mt. Ry. Co. v. McGee, 115 U. S. 469.

As the sufficiency of the act must be governed by the same rule that determines the sufficiency of a judgment, it is apparent that the Act of June 26, 1906, is not of itself sufficient, without judicial procedure to declare and enforce the forfeiture therein provided for.

It is to be remembered that if there is a breach of the conditions subsequent in a grant before the Government could institute proceedings having for its purpose the forfeiture of the grant by reason of the breach, there must be legislative authority authorizing proceedings to enforce forfeiture.

"The mode of asserting or assuming the forfeited grant is subject to the legislative authority of the Government."

U. S. v. ~~Hiplinger~~ Reprinting, ~~5~~ Wall. ~~286~~. 211-268.

In the case of the

United States v. Northern Pacific Ry. Co. 177 U. S. 435,

which was a proceeding instituted by the Government seeking a forfeiture of a grant by reason of a breach of conditions subsequent, the Court held as the bill did not allege that it was brought under the authority of Congress for the purpose of enforcing a forfeiture, and did not allege any other legislative act looking to such an intention, that it was plain, under the authorities, that the bill could not be regarded as having for its purpose the enforcement of a forfeiture. Therefore, the legal effect of the Act of June 26, 1906, and its sole purpose is the authority upon which the Government could institute an inquiry to ascertain whether a railroad company claiming land under the Act of March 3, 1875, has constructed within the period of five years next following the location of the road, or that construction was progressing in good faith at the date of approval of such act. If either of these facts exists such land could not be declared forfeited. This inquiry must be a judicial one in which the parties would be entitled under the authorities hereinbefore referred to, to a trial, at which trial the facts are to be submitted to and determined by a jury.

As it is admitted that the Government has not instituted any such proceeding, the title to the land acquired under the Act of March 3d, 1875, remains unimpaired in the grantee and will remain in it until the Government

in such proceeding can show that the lands are such lands as are to be declared forfeited and restored to the public domain under the Act of June 26, 1906.

Since the Government has not instituted any such proceeding it becomes immaterial, so far as this case is concerned, whether any facts exist that would be sufficient to authorize a judgment of forfeiture in a proper proceeding, for that matter is of no concern to the appellee; under the authorities referred to in appellant's opening brief it is plain that it cannot question appellant's title by attempting to allege that appellant has committed a breach of condition subsequent as appellee is a stranger to such condition.

In view of the foregoing considerations this cause should be reversed and the lower court directed to issue the injunction prayed for.

Respectfully submitted,

W. W. COTTON,
RALPH E. MOODY,
Solicitors for Appellant.

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No. 1503

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA

Plaintiff in Error

vs.

GEORG FRIEDRICH RODIEK

Defendant in Error

Transcript of Record.

Upon Writ of Error to the United States District Court for the Territory of Hawaii

FILMER BROS. CO. PRINT, 1642 HOWARD STREET, S. F.

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Robert W. Breckons, United States Attorney, and J. J. Dunne, Assistant United States Attorney, for Plaintiff in Error.

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In the District Court of the United States, in and for the District and Territory of Hawaii.

In the Matter of the Application of GEORG FRIEDRICH RODIEK, for Naturalization.

Statement.

March 28, 1907. Verified petition for naturalization filed, accompanied with affidavit of witnesses.

Names of the Original Parties to the Cause.

Petitioner: Georg Friedrich Rodiek.

Respondent: The United States of America.

Dates of the Filing of the Pleadings.

March 28, 1907: Petition.

Date of Hearing.

August 13th, 1907: Hearing on petition.

The above hearing was had before Honorable Sanford B. Dole, Judge of said Court.

Decision.

August 12, 1907: Decision on objection to admission of applicant.

August 13th, 1907: Judgment rendered and entered.

Sept. 4th, 1907: Petition for writ of error.

UNITED STATES OF AMERICA.
DEPARTMENT OF COMMERCE AND LABOR.
BUREAU OF IMMIGRATION AND NATURALIZATION,
DIVISION OF NATURALIZATION.

District Court of the United States.

Petition for Naturalization.

In the Matter of the Petition of GEORG FRIEDRICH RODIEK, to be Admitted a Citizen of the United States of America.

To the District Court of the United States for the Territory of Hawaii:

The petition of Georg Friedrich Rodiek respectfully shows:

First. My full name is Georg Friedrich Rodiek.

Second. My place of residence is number 2616 Nuuanu street, city of Honolulu, Territory of Hawaii.

Third. My occupation is merchant.

Fourth. I was born on the 17 day of February, Anno Domini, 1871, at Altenesch, Germany.

Fifth. I emigrated to the Hawaiian Islands, now a part of the United States, from Germany, on or about the 29 day of April, Anno Domini 1891, and

arrived at the port of Honolulu, now in the United States, on the vessel S. S. "Australia."

Seventh. I am married. My wife's name is Pauline Elizabeth Rodiek. She was born in New York City, N. Y., and now resides at Honolulu, Territory of Hawaii. I have two children, and the name, date and place of birth, and place of residence of each of said children is as follows:

Julita Welhelmine Rodiek, born June 16, 1903, at Honolulu, Hawaii, and resides at Honolulu, Hawaii.

Cecelie Virginia Rodiek, born June 1, 1905, at Honolulu, Hawaii, and resides at Honolulu, Hawaii.

Eighth. I am not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in organized government. I am not a polygamist nor a believer in the practice of polygamy. I am attached to the principles of the Constitution of the United States, and it is my intention to become a citizen of the United States and to denounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to William II, Emperor of Germany, of which at this time I am a subject, and it is my intention to reside permanently in the United States.

Ninth. I am able to speak the English language.

Tenth. I have resided continuously in the Hawaiian Islands, now a part of the United States of America, for a term of five years at least immediately preceding the date of this petition, to wit, since the 26 day of May, Anno Domini 1891, and in the now Territory of Hawaii for one year at least next preceding the date of this petition, to wit, since the 26 day of May, Anno Domini, 1891.

Eleventh. I have not heretofore made petition for citizenship to any Court. (I made petition for citizenship to the ——— Court of ——— at ———, on the ——— day of ———, Anno Domino 1——, and the said petition was denied by the said Court for the following reasons and causes, to wit, ———, and the cause of such denial has since been cured or removed.)

Wherefore, your petitioner prays that he may be admitted a citizen of the United States of America. That I have never declared my intention to become a citizen of the United States, but have resided continuously in the Hawaiian Islands since the year A. D. 1891.

GEORG FRIEDRICH RODIEK.

(Signature of petitioner.)

Dated March 28, 1907.

United States of America,
Territory of Hawaii,—ss.

Georg Friedrich Rodiek, being duly sworn, deposes and says that he is the petitioner in the above-entitled proceeding; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

Subscribed and sworn to before me this 28th day of March, Anno Domini, 1907.

[Seal] FRANK L. HATCH,
Clerk.

District Court of the United States.

In the Matter of the Petition of GEORG FRIEDRICH RODIEK, to be Admitted a Citizen of the United States of America.

Affidavit of Witnesses.

United States of America,
Territory of Hawaii,—ss.

James Gordon Spencer, occupation merchant, residing at Honolulu, Hawaii, and Eugene Robert Hendry, occupation United States Marshal, resid-

ing at Honolulu, Hawaii, each being severally, duly and respectively sworn, deposes and says that he is a citizen of the United States of America; that he has personally known George Friedrich Rodiek, the petitioner above mentioned, to be a resident of the United States for a period of at least five years continuously immediately preceding the date of filing his petition, and of the now Territory in which the above-entitled application is made for a period of fifteen years immediately preceding the date of filing of his petition; and that he has personal knowledge that the said petitioner is a person of good moral character, attached to the principles of the Constitution of the United States, and that he is in every way qualified, in his opinion, to be admitted a citizen of the United States.

JAMES GORDON SPENCER.
EUGENE ROBERT HENDRY.

Subscribed and sworn to before me this 28th day of March, Anno Domini, 1907.

[Seal] FRANK L. HATCH,
Clerk.

Filed March 28, 1907.

In the Matter of the Petition of GEORG FRIEDRICH RODIEK, to be Admitted a Citizen of the United States of America.

Oath of Allegiance.

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, and particularly to William II, the Emperor of Germany, of which I have heretofore been a subject; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic, and that I will bear true faith and allegiance to the same.

GEORG FRIEDRICH RODIEK.

Subscribed and sworn to before me, in open court, this 13th day of August, A. D. 1907.

[Seal] A. E. MURPHY,
Deputy Clerk.

Order Admitting Petition to Citizenship.

Upon consideration of the petition of Georg Friedrich Rodiek, and affidavits in support thereof, and further testimony taken in open Court, it is ordered that the said petitioner, who has taken the oath required by law, be, and hereby is, admitted to be

come a citizen of the United States of America, this 13th day of August, A. D. 1907.

By the Court:

SANFORD B. DOLE,
Judge.

In the United States District Court for the Territory of Hawaii.

April A. D. 1907 Term.

In the Matter of the Application of GEORGE FREDERICK RODIEK, for Naturalization.

Decision Overruling Objection to Application for Naturalization.

The application is contested by the District Attorney on the ground that the present law requires a declaration of intention to become a citizen two years before receiving citizenship papers, as a prerequisite; and in this case there is no declaration of intention, the applicant relying on the qualification of five years' residence in the Hawaiian Islands previous to the taking effect of the organic act of the Territory of Hawaii (April 30, 1900; 31 Stat. L., chap. 339, page 141), recognized by section 100 of such act as a substitute for a declaration of intention.

The contention of the District Attorney is "that the purpose of Congress in adopting the act was to reconstruct and remodel the existing law of natur-

alization and to prescribe the only rule by which aliens might be admitted to citizenship, to make that rule uniform, and to insist upon its observance 'throughout the United States.' "

The introductory provision as to the sections providing the method of naturalization is the same both in the new law and in the old. It is this: "An alien may be admitted to become a citizen of the United States in the following manner and not otherwise." These words in the new act are therefore merely affirmative of the same words in the former act, and are subject to the exception in the method of naturalization created by the organic act of the Territory of Hawaii, unless the new act contains words showing an intention by Congress to terminate the running of such exception. Does it contain such words? I fail to find them. The method of naturalization is substantially the same as before but with greater elaboration, and some added conditions, which however have no bearing upon this question.

The exception created by the organic act is limited in its application to the locality of the Territory of Hawaii. The repealing act makes no reference to such legislation although it otherwise refers to the Territory of Hawaii.

"A special statute providing for a particular place, or applicable to a particular locality, is not repealed by a statute general in its terms and ap-

plication, unless the intention of the legislature to repeal or alter the special law is manifest, although the terms of the general act would, taken strictly and but for the special law, include the case or cases provided for by it." 1 Lewis' Sutherland Statutory Construction, section 275, page 529. "It is a principle that a general statute without negative words will not repeal by implication from their repugnancy the provisions of a former one which is special, local or particular, or which is limited in its application, unless there is something in the general law or in the course of legislation upon its subject matter which makes it manifest that the legislature contemplated and intended a repeal." Id., pages 526-7.

The cases cited by the District Attorney, Roche v. Mayor, 40 N. J. L., 259, and others, on the point that when a repealing statute "covers the whole subject of the first, and embraces new provisions plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act" (United States v. Tynen, 78 U. S. 88, 92), do not apply, as the new law expressly repeals certain sections of the Revised Statutes and makes no reference to other sections relating to the subject of naturalization, to wit, to sections 2166, 2169, 2170, 2171, 2173, and 2174 as well as section 100 of the organic act of the Territory of Hawaii. By these omissions

it is evident that Congress, in enacting the new law of naturalization, did not design a complete scheme for this matter and that it is therefore not "decisive evidence of an intention to prescribe the provisions contained in the later act as the only ones on that subject which shall be obligatory," as recognized in the New Jersey case cited above.

In reaching these conclusions I have been largely influenced by the following citations:

"It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special." Rodgers v. United States, 185 U. S. 83, 87-8.

"Implied repeals are not favored. The implication must be necessary. There must be a positive repugnancy between the provisions of the new laws

and those of the old. The language of the exception is special and express; the words relied on as a repeal are general and inconclusive. The rule is, generalia specialibus derogant. 'The general principle is to be applied,' said Boville, C. J., in Thorpe vs. Adams, L. R. 6 C. P. 145, 'to the construction of acts of Parliament is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together.' 'And the reason is,' said Wood, V. C., in Fitzgerald vs. Champenys, 30 L. J. N. S. Eq. 782; 2 Johns. & Hem. 31-45, 'that the legislature having had its attention directed to a special subject and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do.'' Ex parte Crow Dog, 109 U. S. 556, 570-1.

''The question then arises, whether the 66th section of the act of 1799, ch. 128, has been repealed, or whether it remains in full force. That it has not been expressly or by direct terms, repealed, is admitted; and the question resolves itself into the more narrow inquiry, whether it has been repealed by necessary implication. We say, by necessary implication; for it is not sufficient to establish, that subsequent laws cover some or even all of the cases pro-

vided for by it; for they may be merely affirmative, or cumulative or auxiliary." Wood vs. United States, 41 U. S. 341, 362.

The objection to the application is overruled.

Dated, August 12th, 1907.

Messrs. Thompson Clemons, for the Applicant.

J. J. Dunne, Esq., Asst. U. S. District Attorney, contra.

SANFORD B. DOLE,
Judge U. S. District Court.

[Endorsed]: Title of Court and Cause. Decision Overruling Objection to the Application. Filed August 12th, 1907. Frank L. Hatch, Clerk. By A. E. Murphy, Deputy Clerk.

From Minutes of the United States District Court, vol. 4, page 539, Monday, July 15th, 1907.

[Title of Court and Cause.]

Hearing.

Now comes Mr. Georg Friedrich Rodiek, the above-named petitioner, and Mr. J. J. Dunne, Assistant United States District Attorney, appearing on behalf of the United States herein, and the above-entitled matter comes on for hearing.

And thereupon said Assistant United States District Attorney moved the Court that the petition

herein be denied on the ground that said petitioner had failed to comply with paragraph 1 of section 4 of the Act of the Congress of the United States of America of June 29, 1906, in that he had failed to declare his intention to become a citizen of the United States as provided for by said Act of Congress, and after due hearing the Court took the matter under advisement until July 22, 1907, at 10 o'clock A. M.

From Minutes of the United States District Court, vol. 4, page 546, Monday, July 22d, 1907.

[Title of Court and Cause.]

Hearing (Continued).

Now comes the above-named petitioner in person and with his witnesses, and also comes Mr. J. J. Dunne, Assistant United States District Attorney, representing the United States herein.

And the Court ordered that this matter be continued until Monday, July 29, 1907, at 10 o'clock A. M.

From Minutes of the United States District Court, vol. 4, page 552, Monday, July 29, 1907.

[Title of Court and Cause.]

Hearing (Continued).

Now comes Mr. C. F. Clemons, counsel for petitioner herein, and moves the Court that this matter be continued, and Mr. J. J. Dunne, Assistant United States District Attorney, being present and consenting thereto, the Court orders that this matter be continued until Wednesday, August 7th, 1907, at 10 o'clock A. M. for further disposition.

From Minutes of the United States District Court, vol. 4, page 574, Tuesday, August 13th, 1907.

[Title of Court and Cause.]

Hearing (Continued).

The above-entitled matter came on regularly for hearing this day. The petitioner being represented by Mr. C. F. Clemons, and the United States by Mr. J. J. Dunne, Assistant United District Attorney. When the matter was called for hearing it appeared that Eugene Robert Hendry, one of the witnesses named in the petition herein, was not present.

And thereupon Frank L. Winter was sworn as a witness in substitution for said Eugene Robert Hendry. Testimony was thereupon given by the witnesses, James G. Spencer and said Frank L.

Winter on behalf of said applicant and petitioner, and the petitioner was examined by the Court and the respective counsel. The United States through its counsel then moved that the testimony of the aforesaid Frank L. Winter be stricken out for the reason that it did not appear that said Eugene Robert Hendry could not be produced upon this final hearing, and for the reason that it did affirmatively appear from the testimony of said Frank L. Winter that said Eugene Robert Hendry could have been produced upon this final hearing, which motion the Court overruled, and to which ruling said counsel for the United States duly excepted. Thereupon the Court ordered that said petitioner be sworn in as a citizen of the United States, to which order counsel for the United States, on behalf of the United States objected on the following grounds; that the Court had no jurisdiction to make, give or render any judgment of naturalization in the present cause for the reason that it affirmatively appeared that the petitioner had not made the Declaration of Intention called for by the Naturalization Act of June 29, 1906, and upon the further ground that the Naturalization Act of June 29th, 1906, repealed and superseded section 100 of the act to establish a government in the Territory of the Hawaiian Islands, commonly known as the Organic Act, and upon the ground that upon the showing made by

the petitioner his petition should be denied and dismissed, which objection the Court overruled and to which ruling and to all of the proceedings in said matter counsel for the United States on behalf of the United States duly excepted. Thereupon the applicant and petitioner, Georg Friedrich Rodiek, was sworn in as a citizen of the United States.

And thereupon said counsel for the United States moved the Court that pending hearing and determination of the appeal about to be taken in this matter and of which said appeal said counsel for the United States now gives notice, that no certificate of naturalization issue to said petitioner, which motion the Court granted, and it was so ordered.

In the District Court of the United States in and for the District and Territory of Hawaii.

April A. D. 1907 Term.

In the Matter of the Application of GEORG FRIEDRICH RODIEK for Naturalization.

Notice of Petition for Writ of Error.

To Georg Friedrich Rodiek, the Above-named Petitioner and Applicant, and to His Counsel:

You and each of you will please take notice hereby that on Friday the 6th day of September, A. D. 1907,

we shall present to said Court the petition for writ of error herein and assignment of errors herein, and shall move said Court to allow said writ of error and to direct the issuance of the same, and of the citation herein. Copies of said petition for writ of error and of the assignment of errors herein are made a part of this notice, attached hereto and served herewith.

Dated Honolulu, Hawaii, September 4th, A. D. 1907.

THE UNITED STATES OF AMERICA,
By ROBT. W. BRECKONS,
United States Attorney in and for Said District.
J. J. DUNNE,
Assistant United States Attorney for Said District.

Due service of the foregoing notice and receipt of copies of the various papers therein referred to, are hereby admitted this fourth day of September, A. D. 1907.

GEORG FRIEDRICH RODIEK,
By THOMPSON & CLEMONS,
His Attorneys.

[Endorsed]: Title of Court and Cause. Notice. On Petition for Writ of Error. Filed September 4th, 1907. Frank L. Hatch, Clerk. By A. E. Murphy, Deputy Clerk.

In the District Court of the United States in and for the District and Territory of Hawaii.

April A. D. 1907 Term.

In the Matter of the Application of GEORG FRIEDRICH RODIEK for Naturalization.

Petition for Writ of Error.

To the Honorable SANFORD B. DOLE, Judge of the Above-entitled Court, and presiding therein:

The United States of America, conceiving itself aggrieved by the final judgment given, made and entered by the above-named court, in the above-entitled matter, upon the issues therein joined between said United States of America and Georg Friedrich Rodiek, the above-named petitioner and applicant, under the date of August 13th, A. D. 1907, said judgment being now on file in said matter in said court, does hereby petition the above-named court for an order allowing said United States of America to prosecute a writ of error to the United States Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, from said judgment, and from the whole thereof, for the reasons set forth in the assignment of errors which is filed herewith, under and pursuant to the laws of the United States in that behalf made and provided; and

it prays that this its petition for its said writ of error may be allowed, and that a transcript of the record, proceedings and papers upon which said judgment was given, made and entered, as aforesaid, duly authenticated may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California.

Dated Honolulu, Hawaii, Sept. 4th, A. D. 1907.

THE UNITED STATES OF AMERICA,

By ROBT. W. BRECKONS,

United States Attorney.

J. J. DUNNE,

Assistant United States Attorney.

Due service of the foregoing petition for writ of error, and receipt of a copy thereof, are hereby admitted this 4th day of ————, A. D. 1907.

THOMPSON & CLEMONS,

Counsel for Applicant.

[Endorsed]: Title of Court and Cause. Petition for Writ of Error. Filed September 4th, 1907. Frank L. Hatch, Clerk. By A. E. Murphy, Deputy Clerk.

In the District Court of the United States in and for the District and Territory of Hawaii.

April A. D. 1907 Term.

In the Matter of the Application of GEORG FRIEDRICH RODIEK for Naturalization.

Assignment of Errors.

Now comes the United States of America, plaintiff in error herein, and says that in the record and proceedings in the above-entitled matter there is manifest error, and now makes, presents and files the following assignment of errors, upon which it will rely, to wit:

I.

Said Court had no jurisdiction to make, give or render any order or judgment in the above-entitled matter, for the reason that it affirmatively appears from the record in said matter that said Georg Friedrich Rodiek, said petitioner and applicant, did not comply with the Act of Congress of June 29, 1906, revising the law of naturalization, and requiring an antecedent declaration of intention before an applicant can be admitted to naturalization, in this, that said Georg Friedrich Rodiek did not make any such antecedent declaration of intention as is required by said Act of June 29, 1906.

II.

Section 100 of the Act of Congress to establish a Government for the Territory of Hawaii, approved April 30, 1900, has been and is now repealed by the adoption by Congress of the aforesaid Naturalization Act of June 29, 1906.

III.

Said Court erred in holding and deciding that it had jurisdiction to make, give and render any order or judgment in the above-entitled matter, for the reason that it affirmatively appears from the record in said matter that said Georg Friedrich Rodiek said petitioner and applicant, did not comply with the Act of Congress of June 29, 1906, revising the law of naturalization, and requiring an antecedent declaration of intention before an applicant can be admitted to naturalization, in this, that said Georg Friedrich Rodiek did not make any such antecedent declaration of intention as is required by said Act of June 29, 1906.

IV.

Said Court erred in holding and deciding that section 100 of the Act of Congress to establish a government for the Territory of Hawaii, approved April 30, 1900, has not been and is not now repealed by the adoption by Congress of the aforesaid Naturalization Act of June 29, 1906.

V.

Said Court erred in granting the application of petitioner and applicant herein.

VI.

Said Court erred in not denying the application of petitioner and applicant herein.

VII.

Said Court erred in overruling the objection of the United States of America to the granting of the application of petitioner and applicant herein.

VIII.

Said Court erred in making, giving, rendering, entering and filing its judgment in the above-entitled matter in favor of the above-named petitioner and applicant, and against the objections of the United States of America.

IX.

Said Court erred in making, giving, rendering, entering and filing its final judgment in the above-entitled matter in favor of said applicant and petitioner, and against the objections of the United States of America, upon the pleadings and record in said matter, in this, that said final judgment was and is contrary to law, and to the case made and facts stated in the pleadings and record in said action.

In order that the foregoing assignment of errors may appear of record, the United States of America presents the same to said Court, and prays that such

disposition be made thereof as is in accordance with law and the statutes of the United States in such case made and provided; and said The United States of America prays the reversal of the above-mentioned final judgment heretofore given, made, rendered, entered and filed by the above-entitled Court in the above-entitled matter.

Dated Honolulu, Hawaii, September 4th, A. D. 1907.

THE UNITED STATES OF AMERICA,
By ROBT. W. BRECKONS,
United States Attorney in and for said District.
J. J. DUNNE,
Assistant United States Attorney for said District.

Due service of the foregoing assignment and receipt of a copy thereof, are hereby admitted this 4th day of September, A. D. 1907.

THOMPSON & CLEMONS,
Counsel for Petitioner and Applicant.

[Endorsed]: Title of Court and Cause. Assignment of Errors. Filed September 4th, 1907. Frank L. Hatch, Clerk. By A. E. Murphy, Deputy Clerk.

In the District Court of the United States in and for the District and Territory of Hawaii.

April A. D. 1907 Term.

In the Matter of the Application of GEORG FRIEDRICH RODIEK for Naturalization.

Stipulation Relative to Bill of Exceptions.

In the above-entitled matter, in order to avoid unnecessary printing, it is hereby stipulated and agreed by and between the respective parties hereto that no bill of exceptions need be prepared, presented, served, filed or settled in the above-entitled matter and that the writ of error in said matter to the Circuit Court of Appeals for the Ninth Circuit may be prosecuted, submitted and decided upon the record in this matter without any bill of exceptions whatever.

And it is hereby further stipulated and agreed by and between the said parties, that at and during the hearing of the above-entitled matter, to wit, August 13, 1907, in and before the above-entitled Court, said Georg Friedrich Rodiek, said applicant and petitioner, having first been duly sworn, testified that the first declaration he ever made of his intention to become a citizen of the United States was made on March 28, 1907, when he filed his present petition in the above-entitled matter.

Dated Honolulu, Hawaii, September 4th, A. D. 1907.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
By ROBT. W. BRECKONS,
United States Attorney for the Territory of Hawaii.
J. J. DUNNE,
Assistant United States Attorney for the Territory of Hawaii, Counsel for Plaintiff in Error.
GEORG FRIEDRICH RODIEK,
By THOMPSON & CLEMONS,
His Counsel.

[Endorsed]: Title of Court and Cause. Stipulation as to Bill of Exceptions. Filed September 4th, 1907. Frank L. Hatch, Clerk. By A. E. Murphy, Deputy Clerk.

In the District Court of the United States in and for the District and Territory of Hawaii.

April A. D. 1907 Term.

In the Matter of the Application of GEORG FRIEDRICH RODIEK for Naturalization.

Order Allowing Writ of Error.

At a stated term, to wit, the April A. D. 1907 term of the above-entitled court, held at its courtroom in the city of Honolulu, in the aforesaid District of

Hawaii, on the sixth day of September, A. D. 1907. Present: The Honorable SANFORD B. DOLE, Judge of said Court above named.

Upon the petition of the United States of America, and on motion of R. W. Breckons, Esq., United States Attorney for said District, and J. J. Dunne, Esq., Assistant United States Attorney for said District, counsel for the said United States of America;

It is hereby ordered that a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, from the final judgment heretofore given, made, filed and entered by the above-named court in the above-entitled matter, upon the issues therein joined between said the United States of America and and the above-named Georg Friedrich Rodiek, the above-named petitioner and applicant, under date of August 13th, A. D. 1907, be and the same is hereby allowed, and that a certified transcript of the record, stipulations, and all proceedings herein be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated Honolulu, Hawaii, September 6th, A. D. 1907.

SANFORD B. DOLE,
Judge U. S. District Court.

Due service of the above order, and receipt of a copy thereof, are hereby admitted this sixth day of September, A. D. 1907.

THOMPSON & CLEMONS,
Counsel for Petitioner and Applicant.

[Endorsed]: Title of Court and Cause. Order Allowing Writ of Error. Filed Sept. 6th, 1907. Frank L. Hatch, Clerk.

In the District Court of the United States in and for the District and Territory of Hawaii.

In the Matter of the Application of GEORG FRIEDRICH RODIEK for Naturalization.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the record in this cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit under the writ of error heretofore sued out and perfected to said court, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. Petition for naturalization.
2. Affidavit of witnesses.
3. Oath of allegiance.
4. Order of Court admitting petitioner.

5. Decision overruling objection to application.
6. Minutes of Court: July 15, 1907.
   July 22, 1907.
   July 29, 1907.
   August 13, 1907.
7. Notice of petition for writ of error.
8. Petition for writ of error.
9. Assignment of errors.
10. Stipulation as to bill of exceptions.
11. Order allowing writ of error.
12. Writ of error.
13. Citation.
14. This praecipe.

Said transcript to be prepared as required by law and the rules of this court, and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and filed in the office of the clerk of said Circuit Court of Appeals at San Francisco, before the fifth day of October, A. D. 1907.

Dated Honolulu, Hawaii, September 6th, A. D. 1907.

THE UNITED STATES OF AMERICA,
Plaintiffs in Error.
By ROBT. W. BRECKONS,
United States Attorney.
J. J. DUNNE,
Assistant United States Attorney.

[Endorsed]: Title of Court and Cause. Praecipe. Filed Sept. 6th, 1907. Frank L. Hatch, Clerk.

In the District Court of the United States in and for the District and Territory of Hawaii.

In the Matter of the Application of GEORG FRIEDRICH RODIEK, for Naturalization.

Clerk's Certificate to Transcript of Record.

United States of America,
District of Hawaii,—ss.

I, Frank L. Hatch, Clerk of the United States District Court, for the Territory of Hawaii, do hereby certify that the foregoing pages numbered from 1 to 29, inclusive, constitute a true and complete transcript of the record and proceedings had in said court in the matter of the application of Georg Friedrich Rodiek, for naturalization, as the same remains of record and on file in my office, and I further certify that hereto annexed are the original writ of error and citation on appeal in said above-entitled matter.

I further certify that the cost of the foregoing transcript of record is $9.65, and that said amount has been charged by me in my account against the United States.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Honolulu,

in said district and territory, on this 10th day of September, A. D. 1907.

[Seal] FRANK L. HATCH,
Clerk of Said Above-entitled Court.

In the District Court of the United States in and for the District and Territory of Hawaii.

April A. D. 1907 Term.

In the Matter of the Application of GEORG FRIEDRICH RODIEK, for Naturalization.

Writ of Error (Original).

United States of America,—ss.

The President of the United States of America, to the Honorable SANFORD B. DOLE, Judge of the United States District Court for the Territory of Hawaii, Greeting:

Because in the rocord and proceedings, as also in the giving, making, rendition, entering and filing of the final judgment in that certain matter in the aforesaid District Court, before you, between the United States of America and Georg Friedrich Rodiek, petitioner and applicant above named, a manifest error hath happened, to the great preju-

dice and damage of said The United States of America, as is said appears by the petition herein.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid, in this behalf, do command you, if justice be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justice of the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, in the State of California, together with this writ, so as to have the same at the said place in the said Circuit on the fifth (5th) day of October, A. D. 1907, that the said records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct those errors what of right and according to the laws and customs of the United States, should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this sixth day of September, A. D. 1907.

Attest my hand and the seal of the United States District Court for the Territory of Hawaii, at the

Clerk's office at Honolulu, in said Territory, on the day and year last above written.

[Seal] FRANK L. HATCH,
Clerk of the United States District Court for the Territory of Hawaii.

Allowed this sixth day of September, A. D. 1907.

SANFORD B. DOLE,
Judge of the United States District Court for the Territory of Hawaii.

Service of the above writ, and receipt of a copy thereof, are hereby admitted this sixth day of September, A. D. 1907.

THOMPSON & CLEMONS,
Counsel for Petitioner and Applicant.

[Endorsed]: United States District Court, District of Hawaii. In the Matter of the Application of Georg Friedrich Rodiek for Naturalization. Writ of Error. Filed Sept. 6th, 1907. Frank L. Hatch, Clerk. By ————, Deputy Clerk.

In the District Court of the United States in and for the District and Territory of Hawaii.

April A. D. 1907 Term.

In the Matter of the Application of GEORG FRIEDRICH RODIEK, for Naturalization.

Citation (Original).

United States of America,—ss.

The President of the United States of America, to Georg Friedrich Rodiek, the Above-named Petitioner and Applicant, and to His Counsel, Greeting:

You and each of you are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at San Fancisco, in the State of California, within thirty (30) days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the above-named District Court of the United States in and for the Territory and District of Hawaii, wherein the United States of America is plaintiff and petitioner in error, and you are defendant and respondent in error, to show cause, if any there be, why the final judgment in said writ of error mentioned, and from which said writ of error had been allowed, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States of America, this sixth (6th) day of September, A. D. 1907, and of the Independence of

the United States of America the one hundred and thirty-second.

SANFORD B. DOLE,

Judge United States District Court for the Territory of Hawaii.

[Seal] Attest: FRANK L. HATCH,

Clerk United States District Court for the Territory of Hawaii.

Due service of the foregoing citation, and receipt of a copy thereof are hereby admitted this sixth (6th) day of September, A. D. 1907.

THOMPSON & CLEMONS,

Counsel for Petitioner and Applicant.

[Endorsed]: United States District Court, District of Hawaii. In the Matter of the Application of Georg Friedrich Rodiek for Naturalization. Citation. Filed Sept. 6th, 1907. Frank L. Hatch, Clerk. By ————, Deputy.

[Endorsed]: No. 1503. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Plaintiff in Error, vs. Georg Friedrich Rodiek, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the Territory of Hawaii.

Filed September 23, 1907.

F. D. MONCKTON,

Clerk.

No. 1503

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT.

UNITED STATES OF AMERICA
Plaintiff in Error,

vs.

GEORG FRIEDRICH RODIEK,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

ROBT. T. DEVLIN,
United States Attorney
Northern District of California

FRANK A. DURYEA
Special Assistant U. S. Attorney,
Northern District of California

ROBT. W. BRECKONS
U. S. Attorney, District and Territory of Hawaii,
Attorneys for Plaintiff in Error.

No. 1503

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT.

UNITED STATES OF AMERICA
Plaintiff in Error,

vs.

GEORG FRIEDRICH RODIEK,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

The case here is upon writ of error to the United States District Court of the Territory of Hawaii. The defendant in error is a native of Germany who emigrated to the Hawaiian Islands in April, 1891, and has resided there ever since.

On March 28th, 1907, he made and filed with the United States District Court of the Territory of Hawaii, petition for his naturalization as a citizen of the United

States under the Naturalization Act of June 29th, 1906 (pp. 2, 3, 4, 5, and 6 of Record).

As appears by the last clause of the petition (p. 4 Record) and the stipulation relative to Bill of Exceptions (p. 25 Record), the petitioner had never previously made a declaration of intention under oath.

The Government of the United States appeared in the case by Robert W. Breckons, United States Attorney for the said District and Territory of Hawaii by virtue of the provisions of Section 11 of the said Naturalization Act of June 29, 1906 (U. S. Stat. L., Vol. 34, p. 596).

At the hearing of said petition on August 13, 1907, after the testimony of the applicant, defendant in error here, and his witnesses had been heard, the Court ordered the petitioner to be sworn in as a citizen of the United States, to which order, said counsel for the United States, on behalf of the United States, objected upon the grounds that the Court had no jurisdiction to make, give, or render any judgment of naturalization in the said cause, for the reason that it affirmatively appeared that the petitioner had not made the declaration of intention called for by the Naturalization Act of June 29th, 1906, and upon the further ground that said Act of June 29th, 1906, repealed and superseded Section 100 of the Act to Establish a Government in the Territory of the Hawaiian Islands (31 Stat. L., Ch. 339, p. 141), commonly known as the Organic Act, upon the ground that upon the showing made by the petitioner, his petition should be denied and dismissed, which ob-

jection the Court overruled, and to which ruling and to all the proceedings in said matter counsel for United States on behalf of the United States, duly excepted. Thereupon, the applicant and petitioner, Georg Friedrich Rodiek, defendant in error here, was sworn in as a citizen of the United States (pp. 15, 16, and 17, Record).

SPECIFICATION OF ERRORS.

The errors relied upon by the Government herein, are as follows (pp. 21, 22, and 23, Record):

I.

Said Court had no jurisdiction to make, give or render any order or judgment in the above-entitled matter, for the reason that it affirmatively appears from the record in said matter that said Georg Friedrich Rodiek, said petitioner and applicant, did not comply with the Act of Congress of June 29, 1906, revising the law of naturalization, and requiring an antecedent declaration of intention before an applicant can be admitted to naturalization, in this, that said Georg Friedrich Rodiek did not make any such antecedent declaration of intention as is required by said Act of June 29, 1906.

II.

Section 100 of the Act of Congress to establish a Government for the Territory of Hawaii, approved April

30, 1900, has been and is now repealed by the adoption by Congress of the aforesaid Naturalization Act of June 29, 1906.

III.

Said Court erred in holding and deciding that it had jurisdiction to make, give and render any order or judgment in the above-entitled matter, for the reason that it affirmatively appears from the record in said matter that said Georg Friedrich Rodiek, said petitioner and applicant, did not comply with the Act of Congress of June 29, 1906, revising the law of naturalization, and requiring an antecedent declaration of intention before an applicant can be admitted to naturalization, in this, that said Georg Friedrich Rodiek did not make any such antecedent declaration of intention as is required by said Act of June 29, 1906.

IV.

Said Court erred in holding and deciding that Section 100 of the Act of Congress to establish a government for the Territory of Hawaii, approved April 30, 1900, has not been and is not now repealed by the adoption by Congress of the aforesaid Naturalization Act of June 29, 1906.

V.

Said Court erred in granting the application of petitioner and applicant herein.

VI.

Said Court erred in not denying the application of petitioner and applicant herein.

VII.

Said Court erred in overruling the objection of the United States of America to the granting of the application of petitioner and applicant herein.

VIII.

Said Court erred in making, giving, rendering, entering and filing its judgment in the above-entitled matter in favor of the above-entitled petitioner and applicant, and against the objections of the United States of America.

IX.

Said Court erred in making, giving, rendering, entering and filing its final judgment in the above-entitled matter in favor of said applicant and petitioner, and against the objections of the United States of America, upon the pleadings and record in said matter, in this, that said final judgment was and is contrary to law, and to the case made and facts stated in the pleadings and record in said action.

BRIEF OF THE ARGUMENT.

The argument will be divided under three general heads, to-wit:

1. That the acquiring of citizenship of the United

States by aliens is a statutory privilege, and statutes granting the same must be strictly construed in favor of the Government, and against the applicant.

2. That the special provision relating to declaration of intention contained in Section 100 of the said organic act of the Territory of Hawaii, was repealed by implication by the Naturalization Act of June 29, 1906.

3. That said special provision is in any event, unconstitutional.

I.

Under the first general head of the argument, the following proposition is presented:

The privilege of citizenship of the United States by naturalization is strictly statutory (*Zartanan vs. Billings,* 204 U. S. C. 70). It is not an inherent right, and aliens who desire to avail themselves of the privilege must comply strictly with the law. When an alien is naturalized, he acquires rights common to all other citizens of the United States. Among other things, he acquires the right to the elective franchise, and to secure a homestead out of the public domain.

Before he can be entitled to naturalization he must comply with all the requirements of the statute as to preliminary matters as well as to the final act of naturalization, and where there is any doubt as to what is required by the law, the doubt should be resolved against the applicant and in favor of the Government.

The doctrine is firmly established that only that which

is granted in clear and explicit terms passes by a grant of property, franchises, or privileges.

Coosan Mining Co. vs. South Carolina, 144 U. S. 550; 36 L. Ed. 537.

Statutory grants are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; nothing passes by mere implication.

Holyoke W. P. Co. vs. Lyman, 82 U. S., 15 Wall. 200;

Central Trans. Co. vs. Pullman etc. Co., 139 U. S., 24; 35 L. Ed. 55.

II.

Under the second general head of the argument:

First—The general nature of the Naturalization Act of June 29, 1906.

This Act provides that an alien may be admitted to become a citizen of the United States in the manner authorized by itself, "*and not otherwise*" (Sec. 4). It is intended to provide "a *uniform* rule for the naturalization of aliens"; and Congress intended this "uniform rule" to apply "*throughout* the United States." In adopting the Act, Congress had in mind the Territories, and in particular the Territory of Hawaii, as may be seen from Section 3, and, indeed, other sections of the Act. And in Section 26, Congress provided that "All Acts or parts of Acts inconsistent with or repugnant to the provisions of this Act are hereby repealed." It is submitted that a careful reading of the Act, and of all of

its provisions, will make it clear that the purpose of Congress in adopting the Act was to reconstruct and remodel the existing law of naturalization, to prescribe the only rule by which aliens might be admitted to citizenship, to make that rule uniform, and to insist upon its observance "throughout the United States." If this view of the statute be correct, it is entirely obvious that Section 100 of the Organic Act of the Territory of Hawaii, being inconsistent with and repugnant to the Naturalization Act of June 29, 1906, is no longer in force; and Mr. Rodiek can become a citizen of the United States only by compliance with the terms and provisions of the latter Act, "and not otherwise."

That the said special provision contained in said Section 100 of the Organic Act of the Territory of Hawaii relating to declarations of intention, is repugnant to, and inconsistent with, the provisions of said Act of June 29, 1906, is plain when we come to examine certain particular provisions of the said Act of June 29, 1906, to-wit:

(a) The proviso in the first paragraph of the first subdivision of Section 4 of said Act of June 29, 1906, is as follows:

> "Provided, however, that no alien who, in conformity with the law in force at the date of his declaration of intention to become a citizen of the United States, shall be required to renew such declaration."

(b) The proviso in the first paragraph of the second

subdivision of Section 4 of the Act of June 29, 1906, is as follows:

> "Provided that if he has filed his declaration before the passage of this Act, he shall not be required to sign the petition in his own handwriting."

(c) The last paragraph of said subdivision second of said section 4 provides in part, as follows:

> "At the time of filing his petition, there shall be filed with the Clerk of the Court, . . . the declaration of intention of such petitioner, which . . . declaration shall be attached to, and made a part of said petition."

The foregoing provisions clearly indicate that Congress intended that every alien who desired to become a citizen must first make a declaration of intention under oath as required by the said Act, except, perhaps, in the cases of honorably discharged soldiers, and men enlisted in the United States Navy or Marine Corps, to which particular matters we shall hereafter refer more in detail.

Second—The principle of statutory construction to which we appeal is so well formulated in a well considered New Jersey case, that we do no more than quote the principle as there formulated:

> "Every statute must be considered according to what appears to have been the intention of the legislature, and even though two statutes relating to the same subject be not, in terms, repugnant or inconsistent, if the later statute is clearly intended to prescribe the only rule which should govern the case provided for, it will be construed

"as repealing the earlier act. The rule does not "rest strictly upon the ground of repeal by impli- "cation, but upon the principle that when the legis- "lature makes a revision of a particular statute, "and frames a new statute upon the subject mat- "ter, and from the frame-work of the Act it is "apparent that the legislature designed a complete "scheme for this matter, it is a legislative declara- "tion that whatever is embraced in the new law "shall prevail, and whatever is excluded is dis- "carded. It is decisive evidence of an intention to "prescribe the provisions contained in the later act "as the only ones on that subject which shall be "obligatory."

Roche vs. Mayor, etc., of Jersey City, 40 N. J. L. Rep. 257.

The principle so clearly stated here by the New Jersey Court will be found amply supported and applied by the Federal cases:

U. S. vs. Tynen, 78 U. S. (11 Wall.) 92;

The Pakuete Habana, 175 U. S. 677-679-686;

1 Fed. Stat. Annotated, p. 116, note 8.

The judiciary must respect the latest expression of the legislative will, and not permit it to be eluded by mere construction.

Oats vs. First Nat. Bank, 100 U. S. 239; 25 L. Ed. 582-3.

It is the duty of the Courts to "promote in the fullest manner the apparent policy and object of the legislation."

U. S. vs. Jackson, 143 Fed. 783.

The titles of the Acts are the best brief summary of

their purposes and those purposes are obviously of public benefit.

Millard vs. Roberts, 202 U. S. 429;

Church of the Holy Trinity vs. U. S., 143 U. S. 457; 36 L. Ed. 226;

Coosaw Mng. Co. vs. South Carolina, 144 U. S. 550; 36 L., Ed. 537.

Third—Mischief to be Remedied.—In construing the statute and in endeavoring to ascertain the intent of Congress in passing the same where there is any doubt as to the meaning or the intention, it is always proper to consider the mischief intended to be remedied by the passage of the Act.

A guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the Court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body.

Church of the Holy Trinity vs. U. S., 143 U. S. 457; 36 L. Ed. 226.

In the case *in re Mathews,* 109 Fed. Rep. 617, the Court used the following language:

> "Blackstone, in his Commentaries, mentions three
> " things which are to be considered in the construc-
> " tion of all remedial statutes: the old law, the
> " mischief, and the remedy; that is, how the law
> " stood at the making of the Act, the mischief for
> " which that law did not adequately provide, and
> " what remedy the legislature has supplied to cure
> " this mischief. It is the duty of the judges so to

"construe the Act as to suppress the mischief and "advance the remedy. This injunction is simply "to carry out the intention of the lawmaker, which "is the cardinal aim with reference to all statutes."

Therefore, it is proper here to inquire what was the particular mischief intended to be remedied by the passing of the Act of June 29, 1906.

Prior to the passage of said Act, the naturalization laws of the United States were contained generally in Title XXX of the Revised Statutes under the general head "Naturalization." Said Title contained Sections 2165 to 2174 inclusive, all relating to naturalization. Section 2167 was the so-called "Minor Act," and provided in substance that any alien of any race which might be naturalized as citizens of the United States, having come to the United States under the age of eighteen years, and having thence resided here continuously until he made application, and for at least five years in all, and after having reached the age of majority, might be naturalized upon his petition, without having first made a declaration of intention under oath, as required of other aliens. The said section was the source of the great majority of naturalization frauds that have been committed in the United States.

In the report of the Commission of Naturalization appointed by executive order March 1, 1905, and which said report was submitted November 8, 1905, and submitted to Congress and printed and referred to the Committee on Immigration and Naturalization and designated "Document No. 46 of the House of Repre-

sentatives, 59th Congress, first session," we find the following language on page 12 thereof:

> "In securing naturalizations for political purposes and for other improper purposes, the applicants commonly avail themselves of what is known as the minor's act (Sec. 2167 R. S., Act of May 26, 1824), and it is the opinion of Mr. Van Deusen, the special examiner of the Department of Justice, which the Commission believes to be correct, that more perjury is committed under this law than under any other naturalization law. It provides that an alien who comes to the United States under the age of eighteen years may, after 5 years' residence, be admitted to citizenship without having made the preliminary declaration of intention required from aliens coming to this country after the age of 18. It frequently happens, therefore, that one who desires to secure naturalization, seeing that he can do so at once if he swears that he came to this country under 18 years of age, whereas he would otherwise be obliged to make the declaration of intention and wait for two years, commits perjury and secures his naturalization papers the same day on which he applies for them."

On page 78 of the said printed report, Appendix D., in the tabulated portion of the report of Joel M. Marx, special assistant United States Attorney appointed theretofore to prosecute naturalization frauds in New York, we find that out of 791 cases wherein complaints were filed, the defendants arrested for naturalization frauds, 475, or considerably more than one-half, were for violations committed under said Section 2167 of the Revised Statutes.

On page 80 of the said report, Appendix E., we find the following extract from the report of C. V. C. Van Deusen, special examiner of the Department of Justice, relative to said Section 2167, Revised Statutes, to-wit:

> "The provisions of Section 2167 of the Revised
> " Statutes, known as the 'Minor's clause,' whereby
> " aliens arriving in the United States under the
> " age of 18 years are permitted admission as citi-
> " zens without a previous declaration of intention,
> " should be repealed, and all aliens of the age of 19
> " years and over should be required to make such
> " declaration at least two years prior to admission.
> " A majority of the naturalization frauds per-
> " petrated are committed under the provisions of
> " this section of the law."

The said Commission (p. 12 of said report) recommends that both the "Minor's law" and the law requiring the preliminary declaration of intention be repealed.

Congress, however, rejected the recommendation as to repeal of the law requiring preliminary declaration of intention, but adopted the recommendation as to the repeal of the so-called "Minor's law."

It will thus be seen that the principal mischief to be remedied, and intended to be remedied by the passage of the Act of June 29, 1906, was the prevention of frauds under said Section 2167 of the Revised Statutes wherein no declarations of intention were required.

Section 26 of the Act of June 29, 1906, expressly repeals Sections 2165, 2167, 2168, and 2173 of the Revised Statutes of the United States, all of which sections were contained in said Title XXX of the Revised Statutes

under the general head of "Naturalization," as above stated.

It must be presumed, therefore, that Congress intended that the remaining sections of said Title XXX, if not inconsistent with, or repugnant to, the provisions of the Act of June 29, 1906, should remain in force.

The provisions of Section 2166 of said Title XXX of the Revised Statutes, wherein honorably discharged soldiers of the United States may be admitted to citizenship without first having made a declaration of intention, is not upon the same footing with the provisions of Section 2167, Revised Statutes, nor with the said provisions relating to declaration of intention in said Section 100 of the Organic Act of Hawaii, for the reason that it is always possible for an honorably discharged soldier to prove such honorable discharge by documentary evidence of the same, and he is not required to reside more than one year in the United States.

The provisions relating to the naturalization of enlisted men in the United States Navy or Marine Corps, contained in the Naval Appropriation Act of July 26, 1894 (28 Stat. at Large, 124), operate generally throughout all of the United States, and in the latter provision, as in Section 2166, it is possible to always present documentary proof of the applicant's service in, and honorable discharge from, the United States Navy or Marine Corps.

The above-mentioned provisions are operative

throughout all the United States, and neither is local or special, geographically.

It appears to us that it is quite plain that Congress intended that all the acts or parts of acts which dispensed with the previous declaration of intention, with the exceptions of the provisions above referred to, relating to honorably discharged soldiers and enlisted men in the Navy and Marine Corps, which, however, are not local or special, geographically, as above pointed out, should be repealed, and that, therefore, the said special provision of said Section 100 of the Organic Act of the Territory of Hawaii, wherein the same dispenses with the previous declaration of intention by aliens who have resided in the Hawaiian Islands for at least five years prior to April, 1900, are repealed by the enactment of the said Naturalization Act of June 29, 1906. That provision is local and special to the Territory of Hawaii only. All aliens coming within its ~~province~~ provision, if it is operative, can be naturalized without making a previous declaraton of intention. It would also leave the door open to the frauds that were committed under said repealed Section 2167, Revised Statutes, and that was the mischief, as hereinbefore pointed out, intended to be remedied by the Act of June 29, 1906.

Fourth—Departmental Construction.—The contemporaneous construction of a statute by those charged with its execution, . . . is entitled to great weight, and should not be disregarded or overturned except for

cogent reasons, and unless it be clear that such construction is erroneous.

U. S. vs. Johnston, 124 U. S. 236; 31 L. Ed. 394.

It is true, of course, that the Act of June 29, 1906, has not been in existence long, and that therefore the departmental construction thereof has not "long prevailed," but that does not necessarily render the rule above cited negatory. Those who have, for any time whatever, and in this case it has now been more than one year, had the duty of executing the statute, must necessarily have given it a close study, and their construction should be given great weight.

In determining what construction the Department of Commerce and Labor has given the Act of June 29, 1906, with reference to the special provision in question in said Section 100 of the Organic Act of the Territory of Hawaii, we have to look at the Naturalization Regulations adopted and promulgated by the Department of Commerce and Labor under authority and by virtue of Section 28 of the Act of June 29, 1906. Nowhere in said regulations do we find any reference or instruction to subordinate officers or clerks of Courts having to do with naturalization matters relating to said special provision in said Section 100 of the Organic Act of the Territory of Hawaii.

We do find, however, that clerks have been instructed in the matter of receiving petitions for naturalization from honorably discharged soldiers under Section 2166,

Revised Statutes, and from members of the Navy or Marine Corps under the Act of July 26, 1894 (28 Stat. L. 124), wherein antecedent declarations of intention are not required. (See par. 24 of the Regulations of October 2, 1906, and September 23, 1907.)

The conclusion is irresistible that the department construes the Act of June 29, 1906, to continue in force the last above-mentioned provisions, but not the Hawaiian special provisions.

III.

The said special provision contained in said Section 100 *of the Organic Act of the Territory of Hawaii relating to declarations of intention, is, in any event, unconstitutional.*

The fourth subdivision of Section 8 of Article I of the Constitution of the United States, provides that the Congress shall have power "to establish an uniform rule of naturalization . . . throughout the United States."

Pursuant to the power vested in it by the foregoing constitutional provision, Congress has "established an uniform rule of naturalization throughout the United States" by the passage of the Act of June 29th, 1906.

That Congress intended said Act to be an "uniform rule of naturalization throughout the United States" is

evidenced not only by the title of the Act, but by all of its provisions taken together.

The laws passed on the subject must, however, be uniform throughout the United States, but that uniformity is geographical.

Hanover Nat. Bank vs. Moyers, 186 U. S. 181; 46 L. Ed. 1119.

In the last cited case, the question of the constitutionality of the national bankruptcy law was raised. The provision in the Constitution relating to the power to pass naturalization laws, also gives Congress the power to pass uniform laws on the subject of bankruptcies throughout the United States.

See, also,

Leidigh Carriage Co. vs. Stengle, 95 Fed. Rep. 646.

If the Naturalization Act of June 29, 1906, is an "uniform rule of naturalization throughout the United States," then the special provision relating to declarations of intention contained in said Section 100 of the Organic Act of the Territory of Hawaii, being a special provision operative only in the Territory of Hawaii, cannot stand as against said constitutional provision for the reason that the rule of naturalization would not be uniform throughout the United States; that is, geographically speaking.

It is therefore respectfully submitted that the lower Court should be reversed.

ROBT. T. DEVLIN,
U. S. Attorney, Northern District of California.

FRANK A. DURYEA,
Special Assistant U. S. Attorney, Northern District of California.

ROBT. W. BRECKONS,
U. S. Attorney, District and Territory of Hawaii.

Attorneys for Plaintiff in Error.

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No. 1503

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,
Plaintiff in Error.

vs.

GEORG FRIEDRICH RODIEK,
Defendant in Error.

Brief of Defendant in Error.

Error to the United States District Court of Hawaii.

CHARLES F. CLEMONS,
Attorney for Defendant-in-Error.

HAWAIIAN GAZETTE CO., LTD., HONOLULU, T. H.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1503.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.
GEORG FRIEDRICH RODIEK,
Defendant in Error.

Error to the United States District Court for Hawaii.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

The defendant in error, on March 28, 1907, made petition for naturalization to the United States District Court for the Territory of Hawaii. He had then resided in Hawaii for a period beginning more than five years prior to the operation of the Organic Act providing a government for that Territory (31 Stat. L., p. 141) and continuing to the date of his petition (Transcript of Record, p. 4, par. "Tenth"), but had never made declaration of intention to become a citizen of the United States previous to said petition (Transcript, pp. 4, 25).

The United States District Attorney contested the petition on the ground that the present law (Act of Congress of June 29, 1906, ch. 3592; Fed. Stat. Ann., Supp. 1907, p. 230) requires a declaration of intention two years before admission to

citizenship; while the applicant relied on the following provision of the Organic Act, 31 Stat. L., p. 141, sec. 100 (see Transcript, p. 8, Decision):

> "That for the purposes of naturalization under the laws of the United States residence in the Hawaiian Islands prior to the taking effect of this Act shall be deemed equivalent to residence in the United States and in the Territory of Hawaii and the requirement of a previous declaration of intention to become a citizen of the United States and to renounce former allegiance shall not apply to persons who have resided in said Islands at least five years prior to the taking effect of this Act; but all other provisions of the laws of the United States relating to naturalization shall, so far as applicable, apply to persons in the said Islands."

The District Court overruled the objection and granted the petition (Transcript, pp. 13, 17), and the matter comes here on Writ of Error taken by the United States attacking the order and judgment aforesaid (Transcript, pp. 31, 21).

ARGUMENT.

I.

In terms the Assignments of Error (Transcript, pp. 21, et seq.) raise but one specific question, Did the Act of Congress of June 29, 1906, relating to naturalization, repeal Section 100 of the Act of Congress of April 30, 1900, providing a government for Hawaii? The contention of the defendant in error is that it did not, either directly or by implication.

THE NEW LAW IS A GENERAL STATUTE NOT AFFECTING THE *SPECIAL* PROVISIONS OF THE ORGANIC ACT; GENERALIA SPECIALIBUS NON DEROGANT:

Rodgers v. U. S., 185 U. S., 83, 87-89; Id., 83, syllabus;
Ex. p. Crow Dog., 109 U. S., 570-571;

1 Sutherland, Stat. Constr., Lewis' ed., sec. 274; pp. 526-527, 531-532.
Id., sec. 275, pp. 531-532;
Re Matsuji, 9 Hawaiian, 404.

THE DRAG-NET CLAUSE OF THE NEW LAW (34 Stat. L., 603; Fed. Stat. Ann., Supp., p. 237, sec. 26) IS INEFFICIENT AND DOES NOT COVER THE SPECIAL PROVISIONS OF THE ORGANIC ACT (sec. 100):

1 Sutherland, as above, sec. 256, p. 491;
Id., sec. 274, pp. 529-530.

THE REPEALING CLAUSE CAN EFFECT A REPEAL OF THE SPECIAL PROVISION OF THE ORGANIC ACT ONLY BY IMPLICATION; AND THE PRESUMPTION IS AGAINST SUCH REPEAL:

See authorities above cited;
Chew Heong v. U. S., 112 U. S., 549-550;
1 Sutherland, as above, sec. 247, p. 465;
Re Matsuji, 9 Hawaiian, 404;
Rep. v. Edwards, 12 Hawaiian, 58.

THE COURTS, UNDER SUCH PRESUMPTION, WILL ENDEAVOR TO HARMONIZE THE TWO ACTS AND SUSTAIN THE SPECIAL STATUTE:

1 Sutherland, as above, sec. 258, pp. 494-495;
Id., sec. 267, pp. 510-511.

Judge Dole's decision, appealed from, covers these points briefly and thoroughly; we refer to it at length (Transcript, pp. 8-13).

These principles require something more than what appears in the repealing clause, in order to set aside the special provisions which Congress made for Hawaii at a time when its attention was especially directed to Hawaiian conditions: See language of the New Jersey Chancellor quoted by Justice Brewer in *Rogers v. U. S.*, 185, U. S., 83, 88; also *Chew Heong v. U. S.*, 112 U. S., 536, 550. And further, the fact that the repealing clause undertakes to specify just what particular provisions of the former *general* law of naturalization it intended to repeal (namely Rev. Stat., secs. 2165, 2167, 2168, 2173, and Act March 3, 1903, ch. 1012, sec. 39) suggests that the new law is amendatory of the old rather than intended to create an entirely new system.

The District Attorney, however, discovers in the recent Act of Congress relating to naturalization, a clear intent to create an entirely new system of law on this subject, to apply to all places and to all persons,—an obvious purpose "to reconstruct and remodel" the general law and, so, it is argued, to do away with all other and special provisions.

We are confident, however, that it requires something more than such expressions of the Act as "uniform rule," "and *not otherwise*," "*throughout* the United States," to dispose of the question which the Government has raised; and the more the Act is dissected and compared with the former law, the more that confidence is justified. These generalities are not decisive of the case, any more than are numerous other expressions and phrases of the former law which are copied exactly in the amendatory Act.

But what do we find in the new law so different from the old? Of what does the new "system" consist? What is there so

revolutionary in the present "scheme" as to bring it within the principle of the New Jersey and Federal cases relied on by the Government?

See: Decision of Dole, J., Transcript, pp. 10-11.

So far as concerns mere matters of procedure,—and the question here is of that class—the new law is essentially identical with the old law as administered by Court practice. And, so far as the new Act embraces matter not contained in the former general law of naturalization, such new matter is largely departmental regulation, ministerial for the most part, made advisable for simplicity's and for harmony's sake because of the recent creation of a new executive department, that of Commerce and Labor, having rights and duties in regard to aliens (see Fed. Stat. Ann., Supp. 1907, p. 229, sec. 1). Other new provisions of the Act, but by no means affecting the former system of naturalization procedure, are: an attempt to prevent the use of naturalization certificates for *mala fide* purposes of exemption from military service abroad (Id., pp. 234-235, sec. 15), an attempt to discourage naturalization for fraudulent election purposes (Id., p. 232, sec. 6), and discrimination against anarchists and polygamists (Id., p. 232, sec. 7), which amounts to a more direct way of dealing with these classes of undesirables who could never have been naturalized under the former law, once their disqualification appeared or were proved,—as it has equally to be proved under the new law.

A parallel column comparison of the new enactment with the former general law follows:

		Fed. Stat. Ann. Supp. 1907, p. 229, &c:	*Rev. Stat. p. 378, &c:*
Sec.	1	Duties of new dep't of Com. & Labor	not provided for, unnecessary
"	2	Do.	do.

"	3	Courts, jurisdiction	covered by sec. 2165, subdv. 1st and 19 Stat. L. 2.
"	4	Subd. 1st Declaration of intention, qualifications	covered by sec. 2165, subdv. 1st.
		subdv. 2d Petition for certificate	not expressly covered, but matter of court practice: see Webster, Naturalization 316, 317, forms; 2 Loveland, Forms Fed. Pr. 2156, 2157.
		subdv. 3d Oath, allegiance,	covered by sec. 2165, subdv. 2d.
		subdv. 4th Evidence, residence	covered by sec. 2165, subdv. 3d, sec. 2170.
		subdv. 5th Renunciation, titles,	same as sec. 2165, subdv. 4th.
		subdv. 6th Widows, minors	covered by sec. 2168.
"	5	Notice, hearings, &c.	not expressly covered, but matter of court practice.
"	6	Filing and docketing petition, &c.	do., except new law prohibits issuance of certificates during 30 days before general elections.
"	7	Anarchists, polygamists	polygamists not expressly prohibited but impliedly by oath, and never admitted when evidence disclosed disqualification; as to anarchists, see 32 Stat. L., part I, 1222, sec. 39.

"	8	English language	no special requirement, but required by universal policy of courts in administering the law.
"	9	Final hearing	no special requirement, but observed in practice.
"	10	Evidence, 2 witnesses,	do.
"	11	Examination in opposition	do.
"	12	Court files in duplicate,	mere matter of office practice, not specially provided for before.
"	13	Fees of Clerk,	do.
"	14	Binding of papers,	do.
"	15	Cancellation of certificate	not specially provided for but accomplished under Fed. equity jurisdiction; see 1 Foster, Fed. Pr. 26, sec. 11, 42 Fed. 417.
"	16-25	Criminal provisions,	see secs. 5395, 5424-5429.
"	26	Repealing clause	.....
"	27	Forms	.....
"	28	Certified copies	mere office practice not provided for.
"	29	Appropriation	.....
"	30	Naturalization of persons owing allegiance,	see secs. 2167, 2172.
"	31	Effect	.....

Thus, it is seen, the new law, so far as concerns the matter here in question, namely, declaration of intention, is identical

with the old: cf. Fed. Stat. Ann., Supp. 1907, p. 230, subdv. 1st, with Rev. Stat., sec. 2165, subdv. 1st: "*He shall declare on oath* * * * *two years at least prior* to his admission." It, apparently, was not to change such matters as those that the recent statute was enacted; but, rather, Congress seems to have had in mind : (1) the propriety of giving the new Department of Commerce and Labor, created *inter alia* specially to deal with aliens, some duties pertaining to naturalization; (2) to discourage the naturalization of anarchists and polygamists; (3) to discourage naturalization for purposes of evading foreign military service; and (4) to discourage naturalization for fraudulent election purposes.

Now, further, turning to the general law as it stood before the recent amendatory Act, we find a number of salutory provisions which were not expressly repealed by the new law, and the failure to repeal which (with the other provisions which were expressly repealed) induces the strong belief that Congress did not intend this new Act to supercede all other laws whatever on the subject of naturalization. Can it be pretended that the provision, of 45 years' standing, for the naturalization *without previous declaration of intention* of aliens honorably discharged from military service, Rev. Stat., sec. 2166, was to be swept away by this "entirely new system," this general "scheme" by which the former system was wholly "reconstructed" and "remodeled?" Can it be seriously contended that a Legislature, the decline of whose merchant-marine was so strongly urged upon it at the last two sessions of Congress, intended "clearly" to abolish the wise policy of the past quarter-century as to the naturalization of seamen, set forth in Rev. Stat., sec. 2174? And, still more violent the presumption, can it be presumed from the mere use of the general expressions such as "uniform," "not otherwise," et cetera, that such repeal was intended without specific enumeration of these sec-

tions as was made in the case of other sections of the former general law (Repealing clause: Fed. Stat. Ann. Supp. 1907, p. 237, sec. 26). And if the recent enactment was not intended to wipe out all previous legislation on the subject and supply an entirely new "system" then there is no meat left in the District Attorney's contention. The New Jersey and Federal cases relied on by the Government (see Transcript, p. 10) have no application because the late law was not "designed as a complete scheme," and, with greater reason, because if such design were possible as a matter of interpretation from the internal evidence furnished by the Act itself, still the question is a doubtful one and the intent is not that "clear intent" which the rule relied upon requires. The rule is an exception to the rules on which we rely in the introduction to our brief, and as an exception must be construed strictly.

Thus the new Act, in its special clause of repeal, passed over Rev. Stat., sec. 2166 (and also 28 Stat. L., p. 124: naval and marine service) which in case of certain persons dispensed entirely with the two-year declaration of intention, and it also passed by Rev. Stat., sec. 2174, which in case of other persons required only 3-years service in the merchant-marine instead of the usual 5-years residence. If Congress, in its recent enactment, may be regarded as not having touched with profane hands those special provisions as to places and persons, which have been considered as wise policy for more than a quarter-century, no more, we maintain, can Congress be held to have repealed that special provision of the Organic Act as to persons and places, upon which the application relies, and for the continuance of which as the law of this special case, all the presumptions and rules of construction argue strongly as against the mere doubt which the Government's argument has suggested. The applicant should be given the benefit of these rules and presumptions in his honest desire to become an Ameri-

can citizen of Hawaii,—of Hawaii where eligible candidates are so comparatively few as reasonably to have caused Congress in "providing a government for the Territory" to offer special encouragement to the maintenance of as large a proportion of *citizens* as possible, in a community which must, under the best conditions, remain largely pro-Asiatic. The provision of the Organic Act was one of wisdom and foresight, as was the time-honored policy toward military service and service in the merchant-marine; citizenship in our new island possessions is no less worthy of encouragement, no less important, than are military service and commerce.

> "The policy which sought the development of the country by inviting to participation in all of the rights, privileges and immunities of citizenship those who would engage in the labors and endure the trials of frontier life, which has so vastly contributed to the unexampled progress of the nation, justifies the application of a liberal rather than a technical rule in the solution of the question."
>
> *Boyd v. Neb.*, 143 U. S., 135, 179; S. c., 36 L. ed., 116.

II.

At the opening of our argument we say that the assignments of error raise but one *specific* question, namely, as to the repeal of section 100 of the Organic Act creating a government for Hawaii. And this question is the only one that was raised in briefs and argument in the Court below. The United States District Attorney for the Northern District of California, who has lately come into the case, has, however, in his brief, urged the new point of the constitutionality of Section 100 of the Organic Act, which we beg leave to discuss briefly in closing.

His authorities in this behalf are very meagre and unsatisfactory, and, we submit, inconclusive. The contention of un-

constitutionality may be disposed of by considering the preposterous conclusions to which it would carry us. It would wipe out at one stroke all "collective naturalization," so-called, on acquisition of foreign territory by conquest, cession or free gift, or on admission of a territory of the United States to Statehood,

Van Dyne, Citizenship: 234-248;
6 A. & E. Enc. L., 2nd ed., 27 and notes;

because, according to the California District Attorney's argument, uniformity under this provision of the Constitution must apply to the whole territory of the United States "geographically speaking"; upon such reasoning also, a newly acquired territory might be left without citizens or possibility of citizens until a period of two years had elapsed.

The plenary power of Congress over the territories has been established in many cases, has been reaffirmed in the recent Insular cases, and in *Boyd v. Nebraska*, 143 U. S., 135, was declared in a case where naturalization was effected in a manner quite exceptional and special and not under any "uniform" rule:

Boyd v. Neb. 143 U. S., 169-170; S. c., 36 L. ed., 112-113, 114.

The Constitutional power of Congress "to establish an uniform rule of naturalization throughout the United States," is no narrower than the Constitutional requirement of uniformity of duties and imposts, and in regard to the latter the holding is that:

> "The island of Porto Rico by the treaty of cession, became territory appurtenant to the United States but not a part of the United States within the revenue

clauses of the Constitution such as Art. 1, sec. 8, requiring duties, imposts and excises, to be *uniform* throughout the United States."

Downes v. Bidwell, 182, U. S. 244, syllabus by Brown, J., S. c., 45 L. ed., 1088.

"The power over the Territories is vested in Congress without limitation, and * * * this power has been considered the foundation upon which the territorial government rests."

Id., 182, U. S. 267-268; S. c., 45, L. ed., 1099;
Id., 182 U. S., 290, concurring opinion; S. c., 45, L. ed., 1107, 1108, citing,
Boyd v. Neb., 143 U. S., 135 above.

Numerous examples of want of uniformity (of special laws with general laws), in acts of Congress relating to territories, have passed unchallenged. A single statute relating to naturalization may be cited:

"That any member of any Indian tribe, or nation residing in the Indian Territory, may apply to the United States Court therein to become a citizen of the United States, * * * : and the Confederated Peoria Indians residing in the Quapaw Indian Agency, who have heretofore or may hereafter accept their land in severalty under any of the allotment laws of the United States, shall be deemed to be and are hereby declared to be citizens of the United States from and after the selection of their allotments."

26 U. S. Stat. at L., 99; Act May 2, 1890, ch. 182, sec. 43.

In that statute a special privilege was extended to a particular tribe of Indians resident in a limited locality. Numerous examples of want of uniformity in case of laws applying to territories are cited in the decisions in the Insular cases, and see instances of naturalization by even special statute noted in Van Dyne on Citizenship, 234 et seq., including the case of Hawaii.

The order and judgment granting the defendant-in-error's application for naturalization should be sustained.

Respectfully submitted,

CHARLES F. CLEMONS,
Attorney for Defendant-in-Error.

Honolulu, Hawaii, January 30, 1908.

THOMPSON & CLEMONS,
Honolulu, of Counsel.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

NO. 1503.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

GEORG FRIEDRICH RODIEK,
Defendant in Error.

STIPULATION.

It is hereby stipulated and agreed by and between the parties hereto by their respective counsel, that the above-entitled cause may stand submitted without oral argument, on the briefs of the respective parties; counsel for each party to furnish counsel for the opposite party with a typewritten copy of his brief on or before the 30th day of December, 1907, and the printed briefs to be forwarded to the above-entitled Court on or before the 30th day of January, 1908; and, further, that defendant in error may in his printed brief reply to the question of the constitutionality of Section 100 of the Organic Act of Hawaii raised in the typewritten brief of the plaintiff in error.

Dated at Honolulu this 30th day of December, 1907.

THE UNITED STATES OF AMERICA,
By Robt. W. Breckons,
Its Attorney.

GEORG FRIEDRICH RODIEK,
By Charles F. Clemons,
His Attorney.